PACIFIC ISLAND TREATIES

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

EX. A, 96–2, TREATY OF FRIENDSHIP WITH THE REPUBLIC OF KIRIBATI; EX. W, 96–1, TREATY OF FRIENDSHIP WITH TUVALU; EX. P, 96–2, TREATY WITH THE COOK ISLANDS ON FRIENDSHIP AND DELIMITATION OF THE MARITIME BOUNDARY; AND TREATY DOC. 97–5, TREATY WITH NEW ZEALAND ON THE DELIMITATION OF THE MARITIME BOUNDARY BETWEEN THE UNITED STATES AND TOKELAU

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PACIFIC ISLAND TREATIES

TUESDAY, DECEMBER 1, 1981

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:25 p.m., in room 4221, Dirksen Senate Office Building, Hon. S. I. Hayakawa, presiding.

Present: Senator Hayakawa.

Senator HAYAKAWA. The committee will come to order.

The purpose of the hearing this afternoon is to consider four treaties with Pacific Island nations, referred to the Senate for its advice and consent to ratification by the current and previous administrations. The new administration has reviewed all of these treaties and has urged prompt consideration of them by the Senate.

And let me go over the salient features of these treaties.

With the Republic of Kiribati, spelled K-i-r-i-b-a-t-i, pronounced "Kiribas"—they have the most strange principles of orthography in Kiribati—these are the features of the treaties: Consultation on any proposal for third party military use of the islands relinquished by the United States; assurance that these islands cannot be used for military purposes by third parties except with U.S. agreement; and third, nondiscriminatory access to fisheries resources for U.S. vessels and vessels supplying the canneries in American Samoa.

Second, with Tuvalu, another new nation, it provides again for these features: Consultation during times of international crisis regarding any request by the United States for use of Tuvaluan territory for military purposes and by Tuvalu for assistance and support; second, consultation regarding any request by third parties to use Tuvaluan territory for military purposes; and third, nondiscriminatory access to fisheries resources for U.S. vessels and vessels supplying the canneries in American Samoa.

The next treaty is with the Cook Islands. The principal item in this treaty is delimitation of the maritime boundary with American Samoa.

And the fourth treaty, with New Zealand, concerning Tokelau, T-o-k-e-l-a-u—the two basic terms are the delimitation of the maritime boundary with American Samoa, and second, the abandonment by Tokelau of its claim to Swains Island, which is part of American Samoa.

For the information of all concerned, the locations of these new nations are labeled on the large wall map to my left rear. You will see words Tuvalu, Tokelau, Kiribati, and Cook Islands here. If you are curious about it, you can come up afterward and take a closer look.

Some of the islands in these new nations were scenes of battles in World War II.

The part of the South Pacific area in which these islands lie is important to the United States as a strategic link to Australia and New Zealand, and the Indian Ocean and Persian Gulf, and as a source of significant marine resources. Eighteen of the twenty-five islands covered under these four treaties recently received their independence from Great Britain, especially Kiribati and the Tuvalu groups; four islands are under the administration of the self-governing Cook Islands; and three, the Tokelau Islands, are administered by New Zealand. The United States has had weak and unrecognized claims to all of these islands, but the claims were not asserted until 1939, when war clouds were threatening the Pacific area. During the past several decades, the United States has enjoyed friendly, positive relations with these islands, which were enhanced by the United States role in defending them during World War II.

In recent years extensive political changes have taken place in the region. Nine independent countries have emerged from the island groups which had been part of western colonial systems, and the trend toward independent status is continuing.

To assist the committee in its consideration of these four treaties, we are privileged to have with us this afternoon a distinguished group of witnesses from the administration and from other walks of life.

Representing the administration we have Deputy Assistant Secretary of State for East Asian and Pacific Affairs Daniel A. O'Donohue. We have Ambassador William Bodde, the negotiator of the treaties and now our Ambassador in Fiji; and Rear Adm. Donald S. Jones, Director of East Asian and Pacific Affairs in the Office of the Assistant Secretary of Defense for International Security Affairs.

The administration witnesses are accompanied by Mr. Terry Fortune. Mr. Fortune is Assistant Legal Adviser for East Asia, Department of State; and Mr. David Colson, Assistant Legal Adviser for Oceans, Environmental and Scientific Affairs.

In addition, we have with us Hon. Peter Coleman, Governor of American Samoa; Mr. Mark Seidenberg of Los Angeles, Calif.; and Hon. Frederick W. Rohlfing of Honolulu, minority leader of the Hawaii House of Representatives.

Gentlemen, it is a pleasure to welcome all of you to the Committee on Foreign Relations.

Are there other witnesses present?

[No response.]

Senator HAYAKAWA. Before turning to our witnesses, are there other members who wish to make a statement at this time?

[No response.]

Senator HAYAKAWA. We will hear first from the administration witness, Mr. O'Donohue, and then Ambassador Bodde and Admiral Jones.

I understand you have a brief statement, Mr. O'Donohue. You may proceed.

STATEMENT OF DANIEL A. O'DONOHUE, DEPUTY ASSISTANT SECRETARY FOR EAST ASIAN AND PACIFIC AFFAIRS, DEPARTMENT OF STATE

Mr. O'DONOHUE. Thank you.

Mr. Chairman, it is a pleasure to appear before the committee on behalf of the Department of State. Before making a few introductory remarks in support of the Pacific Island treaties, I would like to introduce my colleagues: Ambassador Bodde, our Ambassador to Fiji, who is the Department's principal witness; Mr. Terence Fortune and Mr. David Colson, from the Department's legal staff. I would also like to introduce Rear Adm. Donald S. Jones who will testify on behalf of the Department of Defense.

The treaties before this committee for its consideration are four in number: A Treaty of Friendship with the Republic of Kiribati, a Treaty of Friendship with Tuvalu, a treaty with the Cook Islands on Friendship and Delimitation of the Maritime Boundary between the United States of America and the Cook Islands, and a treaty with New Zealand on the Delimitation of the Maritime Boundary between the United States of America and Tokelau.

The four treaties were signed in 1979 and 1980, and provide for settling the status of 25 small islands to which the United States has claims, for establishing maritime boundaries for American Samoa, and for facilitating access to fishing grounds for boats serving the canneries in American Samoa.

The purpose of the treaties is to protect U.S. interests in the light of the extensive political change which has taken place in the island region of the Pacific during the past two decades. In that time, the island countries have changed from a status of colonial dependence on Great Britain, Australia, and New Zealand to become independent or self-governing states. In this new situation, the United States must treat with the newly independent or self-governing nations on the basis of equality, respect for their sovereignty and dignity. Protection of our own interests in the region requires that the islands remain stable, peaceful and free of great power rivalry, and that the new states look to us as a friend.

We are fortunate to enjoy close and friendly relations with all the states of the region, but in that context, the existence of U.S. claims to 25 islands included in the territory of Kiribati, Tuvalu, the Cook Islands, and Tokelau is an anomaly. It is a serious anomaly. Let me give some examples. Three of the islands under dispute constitute Tokelau. Another contains the island on which the capital city of Tuvalu is located. Yet another contains more than half the total land area of Kiribati.

The U.S. claims to these islands are extremely tenuous and are not supported by any other nation. Maintenance of them would amount to denying the sovereignty of the new island states and would certainly invite friction between ourselves and not only the states directly involved, but their neighbors in the South Pacific. We believe it is very much in our own national interest to relinquish these claims amicably,

to draw agreed maritime boundaries between the Cook Islands and Tokelau and American Samoa, and to further economic access to the fishing grounds of these nations' waters for vessels from American Samoa and from the continental United States. These treaties do not damage our security interests in the Pacific, and they do not cost the American taxpayer any money. They do earn us a measure of good will with our Pacific neighbors.

I would like, with your permission, Mr. Chairman, to ask Ambassador Bodde to speak to these treaties as the Department's principal witness.

By way of introduction, I would note that Ambassador Bodde, before his assignment to Fiji, was the Department of State Office Director for Pacific Island Affairs. In that capacity he was intimately involved in negotiating these agreements. He signed the treaties with Kiribati and Tuvalu for the United States, and he is fully familiar with the treaties with the Cook Islands and with New Zealand on behalf of Tokelau.

With your permission, sir?

Senator HAYAKAWA. Thank you, Mr. O'Donohue.

Ambassador Bodde?

STATEMENT OF HON. WILLIAM BODDE, JR., U.S. AMBASSADOR TO FIJI, TO THE KINGDOM OF TONGA, AND TO TUVALU AND MINISTER TO THE REPUBLIC OF KIRIBATI, ACCOMPANIED BY TERENCE FORTUNE, ASSISTANT LEGAL ADVISER FOR EAST ASIA, DEPARTMENT OF STATE; AND DAVID COLSON, ASSOCIATE LEGAL ADVISER FOR OCEANS, ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, DEPARTMENT OF STATE

Ambassador BODDE. Mr. Chairman, it is a pleasure and an honor to testify before this committee.

I would request that my prepared statement be inserted in the record and that I be permitted to summarize the statement for the committee.

Senator HAYAKAWA. It is so ordered.

Ambassador BODDE. Thank you.

I have been associated with the treaties under consideration since 1978 when the interagency committee of the executive branch, in consultation with Congress, the tuna industry, Hawaii and American Samoa, formulated the U.S. position for the negotiations.

Senator HAYAKAWA. The concerned parties are the United States, the tuna industry—will you enumerate those again?

Ambassador BODDE. Yes, the tuna industry, Hawaii and American Samoa.

Senator HAYAKAWA. Hawaii and American Samoa. Thank you very much.

Ambassador BODDE. I then led the respective delegations to negotiate these four treaties now before this committee, and had the honor to sign two of them on behalf of the Government of the United States.

Since 1980 I have served as American Ambassador to Fiji, Tonga and Tuvalu, American Minister to Kiribati, and as U.S. Representative to the South Pacific Commission.

In the last two decades the South Pacific region has undergone tremendous political change. Prior to 1962 all the South Pacific islands

were under American, British, Australian, New Zealand or French control. Since then, nine of the former colonies or protectorates became fully independent, and two have gained considerable political autonomy.

The vast Oceania region which encompasses these island nations and territories is one in which the United States has important interests through the area, and important lines of communications with two major allies, Australia and New Zealand, and to the Indian Ocean and Persian Gulf.

Within or adjacent to the region are the State of Hawaii, the U.S. Pacific territories, American Samoa and Guam, and the emerging political entities of Micronesia. These are all adjacent to the area that the treaties encompass.

The major U.S. interests in the region are that the region remain stable, peaceful and friendly to the United States and its allies, that the region develop politically, socially and economically free of Soviet or other adverse influence, that the U.S. Pacific territories and Hawaii have friendly and cooperative relations with their Pacific island neighbors, and that the United States have nondiscriminatory access to the marine resources of this vast ocean region. To protect these interests, it is important that our relations with the South Pacific island nations be established firmly on the basis of friendship, cooperation, and mutual respect.

It became apparent with the emergence of these newly independent states that the issue of the U.S. claims to the 25 islands in question would have to be resolved if our relations with the new South Pacific island nations were to rest on a solid foundation.

In preparing for these negotiations, we not only consulted within the executive branch, but also with Members and their staffs in both Houses of Congress, as well as with the Governors of Hawaii and American Samoa. In addition, there were extensive consultations with the U.S. tuna industry.

The consultation process continued throughout the negotiations, and representatives from Hawaii and American Samoa were included in the American delegations. In fact, Gov. Peter Coleman personally participated in some of the negotiation sessions.

In negotiating the relinquishment of U.S. claims, we sought and obtained assurances necessary for the protection of basic American political security and economic interests in the region, including close cooperation by the island nations with American Samoa, a commitment to consult on any future military use of the islands in question, and a pledge of nondiscriminatory treatment of U.S. fishing vessels and vessels supplying the U.S.-owned canneries in Pago Pago.

In conclusion, I would like to touch upon developments in the region since the treaties were negotiated. Fiji was the first nation to agree to join the United States in providing troops for the multinational force of observers in the Sinai. The island nations have taken a strong position against the Soviet invasion of Afghanistan in the United Nations and elsewhere. For example, they have banned Soviet tourist ships from their ports, although the Soviet tourist ships carrying Australian tourists were a major foreign income-earner for them. The island nations turned down a recent Soviet offer to do major hydrographic and geological research in the South Pacific. American tuna companies and the American Tuna Boat Owners Association have negotiated or are

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in the process of negotiating fisheries agreements with many of these South Pacific island nations. Finally, close economic relations have been established between Kiribati and Hawaii and American Samoa.

It is my conviction that the successful negotiation of the treaties before this committee helped to create the existing relationships between the United States and the South Pacific nations which made these developments possible. A recommendation of this committee to the full Senate that it give advice and consent to the ratification of the four treaties would be a vital contribution to good relations with the region.

Thank you for the opportunity to make this statement. I will be happy to answer any questions.

[Ambassador Bodde's prepared statement follows:]

PREPARED STATEMENT OF HON. WILLIAM BODDE, JR.

I am pleased and honored to appear before the Committee on Foreign Relations to discuss with you the four treaties under consideration.

The treaties concern United States claims to certain islands in the Pacific Ocean. Of these islands, fourteen are located in Kiribati, four in Tuvalu, four in the Cook Islands, and three in Tokelau.

Before turning to the details of the claims and the treaties, I would like to outline the political setting in which our policy was developed.

SETTING

In the last two decades, the South Pacific region has undergone tremendous political change. Prior to 1962 all the South Pacific islands were under American, British, Australian, New Zealand or French control. New Zealand's granting of independence to Western Samoa in 1962 began a process which has brought independence or quasi-independence to eleven island countries.

With the exception of Vanuatu, were a short-lived rebellion took place, this process has taken place without bloodshed and with the cooperation and support of the former colonial administrators. In fact, the former colonial powers continue to supply significant financial assistance to the new nations.

Relations among the Pacific island nations are friendly and cooperative. As a result, a number of important regional institutions have been successfully established. The United States and the American territories in the South Pacific participate in some of these regional institutions.

Contact between Americans and the South Pacific Islands goes back to the eighteenth and nineteenth centuries, when American whalers and missionaries first entered the region. Throughout the nineteenth and early twentieth centuries, America's interest and involvement fluctuated. In the wake of Pearl Harbor, we once again played a major role in the region; during World War II we launched the Pacific campaign from bases in Australia, New Zealand and the Pacific islands. Some of the bloodiest battles of World War II were fought on these islands.

To this day a large reservoir of good will toward the United States exists on the part of the South Pacific islanders based on their experience with Americans during the war. During my travels in Fiji and other South Pacific nations, I have met many islanders who express great pride in having fought alongside American troops against the Japanese at Guadalcanal, Bougainville, and in other campaigns in World War II.

U.S. INTEREST IN THE REGION

The United States has a wide range of important interests in the South Pacific. The South Pacific straddles the shipping Lanes between the United States and our ANZUS allies and encompasses six million square miles of major tuna fishing grounds.

Because Hawaii, Guam, American Samoa, and the Trust Territory of the Pacific Islands are located in the region, the South Pacific would continue to be of political, economic, and strategic importance to the United States even if these other factors were not present.

It is in the United States interest that:

The region remain stable, peaceful, and friendly to the United States and its allies;

The region develop politically, socially, and economically free of Soviet or other adverse influence;

The U.S. Pacific territories and Hawaii have friendly and cooperative relations with their Pacific islands neighbors;

The United States have non-discriminatory access to the marine resources of this vast ocean region.

To protect these interests, it is imperative that our relations with the South Pacific island nations be established firmly on the basis of friendship, cooperation, and mutual respect. The treaties which are the subject of these hearings were concluded with these objectives in mind, and in my view fully satisfy them.

THE U.S. CLAIMS

Since 1939 the United States has claimed 26 islands in the Pacific which, at the time, were claimed also by the United Kingdom and New Zealand. The islands in question were discovered by Western seamen between 1775 and 1860. Several of the discoveries were made by explorers who claimed dominion over them for their sovereigns.

In most cases, however, the islands were simply visited by whaling fleets which noted their location but made no claims of dominion. Some seven or eight islands, including Canton, Enderbury, Hull, McKean, Gardner, Phoenix, Funafuti, and Faka'ofu were discovered by United States nationals, generally whalers. The British discovered most of the rest: In several cases the identity of the original discoverers is unknown.

In 1856, stimulated by guano mining prospects, an act of Congress permitted the President to consider "as appertaining to the United States" islands on which U.S. nationals might obtain certificates from the Department of State giving them exclusive rights to mine guano.

To obtain such certificates, the applicant was required to demonstrate that he had discovered, occupied and taken possession of the island in question and that it was not already in possession or occupation of any other government. It is unclear how many islands were actually mined in this manner, as certificates were not always issued and not all certified claims were actually exploited.

More important, it is clear that both the Congress and the Executive Branch intended that U.S. jurisdiction be extended to these islands only so long as mining operations were taking place. The sponsor of the 1856 legislation, Senator Seward of New York, stated that:

"The Bill itself . . . provides that whenever the guano should be exhausted or ceased to be found on the islands, they should revert and relapse out of the jurisdiction of the United States".

The Act itself contemplates that it would not serve as a basis for U.S. sovereignty in perpetuity, by expressly providing that: "Nothing contained in this (Act) shall be construed as obliging the United States to retain possession of the islands . . . after the guano shall have been removed from the same." (48 U.S.C. 1419).

Frequent statements were made in succeeding decades by high-ranking government officials to the effect that the United States did not in fact consider itself to have made sovereign claims to any of the guano islands.

In the late 1880's when guano mining had virtually ceased in the islands, Britain—whose nationals had also been mining guano on the islands—began to assert sovereignty over most, although not all, of these islands. This consisted initially of declaring the islands to be protectorates, of authorizing various sorts of commercial activities, and of providing for rudimentary government functions on those islands that were inhabited. With respect to the most remote islands, particularly uninhabited ones, British actions often took the form of nothing more than a repeated assertion of dominion and occasional attempts at colonization.

In 1901 Britain, which later annexed the Gilberts and Ellice Colony in 1916, transferred the Northern Cook Islands and the Tokelau Islands to New Zealand administration. The United States did not protest any of the British or New Zealand actions or assertions.

In 1939, stimulated by South Pacific civil air activities, the United States for the first time asserted a formal claim to the other 25 islands. In the same year, the United States and the United Kingdom signed an agreement for joint ad-

ministration of two of the islands, Canton and Enderbury. From 1971 to 1980, the United States exercised sole administration over Canton and Enderbury under a special arrangement with the United Kingdom.

RESOLVING THE CLAIMS

The need for settlement of these claims became apparent as the British colonies moved toward independence and the New Zealand territories gained greater autonomy in their relations with Wellington.

Recognizing that continued assertion of weakly-founded U.S. claims would be seen not only by the states affected but by the whole South Pacific region as an unfriendly and overbearing act, an inter-agency committee of the Executive Branch (State, Defense, Justice, Interior, NSC, CIA) recommended that the United States should negotiate the relinquishment of these claims in return for assurances that would protect United States economic and security interests in the region.

Following the decision by the inter-agency committee, the State Department consulted with Congress. My colleagues and I consulted with members and staff of this committee as well as with other interested committees in the Senate and the House of Representatives. We also provided potentially interested committees with written statements of intentions.

In developing the United States position for the negotiations, we met with representatives of the United States tuna industry as well as with the Western Pacific Regional Fisheries Council in Hawaii. We also consulted with representatives from the State of Hawaii and from American Samoa, two American areas which would be directly affected. The Governor of American Samoa, Peter Coleman, Lieutenant Governor Tufele Li'a, and other American Samoan officials not only helped develop the U.S. position in preparing for the negotiations, but participated directly in the negotiations as members of the U.S. Delegation. This was also the case regarding representatives of the State of Hawaii.

As the leader of the delegation which negotiated these treaties, I am convinced that this extensive process of preliminary consultation and broad participation enabled the United States delegation to develop positions and obtain conditions in the treaties which fully protect a wide range of U.S. interest.

NEGOTIATIONS WITH TUVALU AND KIRIBATI

In the Treaty of Friendship, the United States of Tuvalu agree to consult on matters of mutual concern and interest as well as to work cooperatively to promote social and economic development, peace and security in the South Pacific region.

The two governments agree to consult during times of "international crisis" regarding any request by the United States for use of Tuvaluan territory for military purposes and by Tuvalu for assistance and support. The two governments also agree to consult regarding any request by third parties to use Tuvaluan Territory for military purposes.

Under the terms of the treaty with Kiribati the two governments agree to consult on any proposal for third party military use of these islands. Any future use by the Government of the United States of the U.S.-built facilities on Canton, Endenbury, or Hull will be negotiated between the two governments. These facilities cannot be used for military purposes by third parties except with U.S. agreement.

In both treaties the governments agree to consult in matters of mutual interest relating to the conservation, development, utilization, and exploitation of fisheries resources. The Government of Tuvalu also recognizes the desirability of developing a close cooperative relationship between Tuvalu and its neighbor, American Samoa. Non-discriminatory access is important not only for U.S. fishing vessels, but also for non-U.S. flag fishing vessels supplying the American canneries in American Samoa. Given the importance of the canneries to the economy of American Samoa, Governor Coleman encouraged the United States to negotiate a relationship with his neighbors which would permit close cooperation with American Samoa. The Governor participated in the negotiations and is satisfied that the cooperation provisions of the treaties will benefit American Samoa by establishing profitable ventures.

Through a provision in the Tuvalu Treaty and in an accompanying letter in the case of the Kiribati Treaty, non-discriminatory access is assured for U.S. vessels and vessels supplying the canneries in American Samoa. However, neither

treaty constitutes a bilateral fishing agreement, nor does either impinge or abrogate protection afforded American fishermen under existing U.S. legislation. Neither treaty contains any commitment for U.S. financial assistance or foreign aid.

NEGOTIATIONS WITH NEW ZEALAND, THE COOK ISLANDS AND TOKELAU

The treaties concerning the Cook Islands and Tokelau presented a somewhat different situation.

Because of the United States-New Zealand defense relationship under the ANZUS treaty, and given New Zealand's responsibility for the defense of the Cook Islands and Tokelau, specific security assurances were not necessary in these treaties. At the same time, we wished to obtain assurances of nondiscriminatory treatment of U.S. fishing vessels and non-American fishing vessels supplying the American canneries in American Samoa. A further complication in the case of Tokelau was that there was a counter-claim by the Tokelauans to Swains Island, which has been formally party of American Samoa since 1925.

As both the Cook Islands and Tokelau share a maritime boundary with American Samoa, we negotiated maritime boundary treaties. The assurances of nondiscriminatory treatment on fisheries were handled through an exchange of letters which have been submitted to this committee with the treaties.

In the case of the Tokelau claim to Swains Island, this was taken care of by agreeing to place Swains Island on the United States side of the boundary and was reinforced by a clause noting that New Zealand has never claimed or administered any island in American Samoa as part of Tokelau.

None of the four treaties compromises our juridical position on highly migratory species.

RELATIONS WITH THE SOUTH PACIFIC SINCE THE NEGOTIATIONS OF THE FOUR TREATIES

Since we negotiated the four treaties, relations between the independent nations of the South Pacific and the United States have continued to improve. While there are a number of factors contributing to better relations, there is no doubt that the successful negotiation of the four treaties and the resolution of the claims issue has made a major contribution to our close and friendly relations with the island nations.

Some illustrations of the positive state of relations between the United States and the South Pacific nations are:

Fiji was the first nation in the world to agree to provide troops for the Multinational Force and Observers in the Sinai;

The United States has received growing support from the island nations in international fora including the UNGA;

The islands have taken a strong stand in the U.N. against the Soviet invasion of Afghanistan and through direct actions such as barring Soviet tourist ships from their ports;

The island states turned down a Soviet offer to do major marine hydrographic and geological research in the South Pacific;

American fishing interests are in the process of concluding commercial arrangements with island nations;

Economic relations have been established between Kiribati and Hawaii and American Samoa.

Close and friendly relations between the United States and this strategic region are and will continue to be important to the United States.

The four treaties before this committee are a major component of U.S. policy toward these small developing nations, which are good friends of the United States. At the same time, the treaties protect American strategic, political, and economic interest in the region. The advice and consent of this committee to ratification of these treaties will be a vital contribution to our good relations with the region.

Thank you for the opportunity to present this statement. I will be pleased to answer any questions.

Senator HAYAKAWA. Thank you, Ambassador Bodde.

Let me hear from Admiral Jones next before we go to questions.

Admiral Jones?

STATEMENT OF REAR ADM. DONALD S. JONES, DIRECTOR, EAST ASIA AND PACIFIC REGION, OFFICE OF THE ASSISTANT SECRETARY FOR INTERNATIONAL SECURITY AFFAIRS, DEPARTMENT OF DEFENSE

Admiral JONES. Thank you, Mr. Chairman. It is a pleasure for me to appear before you today.

The Department of Defense supports the treaties under consideration. As Ambassador Bodde has explained, they preserve U.S. strategic interests in the region.

The treaties with Kiribati and Tuvalu specifically provide that none of the disputed islands in their territory will be made available to third parties for military purposes without prior consultation with the United States. On the basis of discussions with these two nations, we feel confident that our security needs would be met in any situation that might arise. Moreover, Kiribati has agreed that facilities constructed by the United States on Canton, Enderbury and Hull Islands cannot be used by third parties for military purposes without our express consent.

The responsibility of New Zealand for the defense of Cook Islands and Tokelau, coupled with the ANZUS Treaty, gives the United States necessary assurances that those islands will not be used for hostile military purposes.

The Department of Defense has no present military requirements for any of the islands covered by the four proposed treaties. Future basing needs in this remote area are unlikely. Our major installations elsewhere in the Pacific, particularly in Guam and the Philippines, together with the important missile testing range on Kwajalein Atoll in the Marshall Islands, meet our present security needs. The close defense relationship which the United States enjoys with Australia and New Zealand further insures that this area will not become prey to an unfriendly nation.

The only military installation we have had anywhere in the immediate area of these islands since World War II was a missile test facility located on Canton Island, with some additional instrumentation on Enderbury, Birnie, and Hull Islands. This facility was used for a few years in the early 1970's. We subsequently maintained it in a standby condition, but even that caretaker status cost several million dollars a year, which by 1979 could no longer be justified. The Kwajalein Missile Range, together with occasional testing in broad ocean areas, meets our current test requirements in the Pacific area. The Government of the Marshall Islands has recently indicated its willingness to enter into long-term arrangements for the use of Kwajalein in connection with a compact of free association which will govern U.S. relations with Micronesia after termination of the present United Nations trusteeship. Moreover, the proposed treaty with Kiribati recognizes the possibility of future United States use of facilities constructed on Canton, Enderbury, and Hull Islands, should that ever become necessary.

In summary, Mr. Chairman, we believe these treaties are consistent with U.S. security interests. They preserve close and friendly relations with the island governments concerned.

The Department of Defense therefore supports the proposed treaties.

Thank you.

Senator HAYAKAWA. Thank you, Admiral Jones.

I would like to raise some questions with Ambassador Bodde, if I may.

You mentioned, Ambassador Bodde, that some of the former colonial powers continue to provide financial assistance to some of the new island nations.

Could you describe the nature of this assistance and compare it with whatever assistance the United States provides?

Ambassador BODDE. Certainly, Mr. Chairman.

The major aid donor to the South Pacific Island nations is Australia, followed by New Zealand. Great Britain also provides a considerable amount of aid, including budgetary assistance to Kiribati and Tuvalu. The budgetary assistance is to be phased out over some years, but in the early years of independence they are actually picking up part of the operating costs of the government. They also supply a great amount of technical assistance.

The magnitude of New Zealand and Australia aid is much, much greater than ours. I don't have the figures right here, but even if you eliminate Papua New Guinea, which receives $225 million worth of aid a year from Australia, the rest of the aid to the South Pacific is in the tens of millions of dollars for both Australia and New Zealand.

At the present time the United States gives, in terms of aid something under $4 million a year. We have no bilateral aid agreements; our aid goes either through regional institutions or through private voluntary organizations.

Senator HAYAKAWA. The United States is providing $4 million?

Ambassador BODDE. Yes; for the whole region. That will go up slightly next year because of our involvement in the hydrographic research project. But our aid there is very small, particularly compared to Australia, New Zealand, and Great Britain.

Senator HAYAKAWA. So Australia is a principal benefactor here.

Will Australia and New Zealand continue to help out in these areas after these treaties are ratified and their independence clearly established?

Ambassador BODDE. Oh, yes. Australia and New Zealand both are committed to devoting significant amounts of their foreign aid budget to these countries, and both Australia and New Zealand encouraged us to complete these treaties in order to remove what they thought were irritants to United States relations in the region.

Senator HAYAKAWA. Do Australia and New Zealand get any economic benefits out of this help that they are giving to these islands?

Ambassador BODDE. The trade balance between New Zealand and Australia with the South Pacific island nations is in favor of Australia and New Zealand, so they do benefit to that degree. With the Pacific islands we are dealing with here, there is so little involved that it is not significant.

Senator HAYAKAWA. You mentioned major tuna fishing grounds in your testimony. Are California fishing interests involved in this area? And what effect do these treaties have on California and other American fishing operations?

Ambassador BODDE. As I mentioned in my opening statement, when we were preparing our negotiating position, we consulted with the tuna industry, particularly in California with Van Camp and with Starkist, and with the tuna boatowners in San Diego. They welcomed the treaties because they wanted to avoid the history of the eastern tropical Pacific which has been one of confrontation.

American fishing vessels in recent years, the number of American fishing vessels, superseiners from San Diego, has increased markedly, and will continue to increase. The fishing is good. And talking to the tuna people, they plan on more and more boats going out.

Now, Castle & Cook in Hawaii, as far as I understand, has signed an agreement with Kiribati, since we negotiated this treaty. Starkist and the American Tuna Boat Association have been discussing the possibility of licensing agreements with various South Pacific countries.

And so in point of fact, yes, there are specific tuna interests becoming active in the area, and they are able to work out satisfactory agreements because our relationship is healthy, and our relationship is healthy I think in large part because we negotiated fair and honorable treaties.

Senator HAYAKAWA. Thank you. That is sort of good news for San Diego.

You said an act of Congress permitted the President to consider guano islands, as appertaining to the United States. This term "appertaining" is a peculiar term. I am not familiar with it. Would you or one of your colleagues explain that term? Or perhaps someone from your legal advisor's office could explain it. Mr. Fortune?

Mr. FORTUNE. Mr. Chairman, my reading of the legislative history leads me to conclude that the term "appertaining" was meant to signify a temporary relationship between the guano island and the United States, through which U.S. jurisdiction would be asserted while the guano mining operations continued.

The debate indicates that appertaining was not intended to mean a relationship based on sovereignty or permanent dominion, but rather a temporary attachment for the specific purpose of mining the guano. Many of the statements on the floor indicated that once the mining deposits had been exhausted, that relationship would cease to exist.

Senator HAYAKAWA. So your response is, it connotes some degree of sovereignty, and the answer is definitely "No"?

Mr. FORTUNE. Definitely "No."

Senator HAYAKAWA. And you say, Mr. Bodde, that the Guano Act would not serve as a basis for U.S. sovereignty in perpetuity, but the way I read the words of the act which you quoted, they are permissive rather than mandatory. Is that correct, Mr. Fortune?

Mr. FORTUNE. Mr. Chairman, if I understand the question, the act is permissive in that it allows the President, upon proper documentation, to proclaim that certain islands appertain to the United States for the limited purpose I have just discussed. The act certainly does not mandate that he do so. Much less does it require that we take the more serious step of asserting sovereignty over these islands.

Senator HAYAKAWA. Well, sovereignty is involved either way; isn't it? That is, if we make use of the islands, we don't have sovereignty.

And if we don't make use of the islands we don't have sovereignty either; do we?

Mr. FORTUNE. We could have used to guano island activities as the basis for an assertion of sovereignty, but we did not. Both the purpose of the act, as indicated by its legislative history, and the activities conducted under it were limited in nature.

Had we wanted to establish sovereignty, we would have had to publicly proclaim that intention and we would have had to exercise a more general governmental jurisdiction over the islands.

I might add, Mr. Chairman, that after the period of guano mining, which terminated roughly in 1890, at least as far as American operations were concerned, the British did just that. They made a general claim of sovereignty, they attempted to establish a governmental jurisdiction over the islands, and they did so without protest from the United States for a period of over 50 years. This is the basis for our firm conclusion that by 1939, our claims had no merit.

Senator HAYAKAWA. These guano islands, are they populated?

Mr. FORTUNE. Some of them are and some of them are not.

Senator HAYAKAWA. But even the ones that are do not have a large population, I take it?

Mr. FORTUNE. I think the largest population would be found on Christmas Island, but I am not certain of that. Perhaps Ambassador Bodde could amplify.

Ambassador BODDE. It would be on Christmas Island, and that is a small population.

Senator HAYAKAWA. Thank you, Mr. Ambassador. Would you describe, Mr. Bodde, the extent of U.S. civil air activity in the area through the forties and fifties; that is, you mentioned United States first asserted sovereignty in 1939, stimulated by civil air activities because of the threats of war impending at that time. Is that correct?

Ambassador BODDE. Well, Mr. Chairman, I think the reason was a technological one. That is, that the flying clippers had to refuel in those days to reach Australia, and so Canton was used as a refueling station.

Of course, with the war coming on, that probably made it of even more interest. But once we had the long-range aircraft, these islands were in the same position as the old coaling stations; they were not so interesting anymore.

Senator HAYAKAWA. So after World War II, there was relatively little military involvement on the part of the United States in these islands.

Ambassador BODDE. With the exception of, as the Admiral said, on Canton Island where we did use the island for almost 10 years to do some missile testing and missile observations.

Senator HAYAKAWA. Mr. Bodde, you mentioned that you consulted with this committee and other committees during the negotiations, and that presumably was the 96th Congress.

Ambassador BODDE. Yes; that is correct.

Senator HAYAKAWA. Our institutional memory is quite short. Could you tell us something about those consultations?

Ambassador BODDE. Yes. When we were working out our negotiating position, we came up and visited various staff members and any Senator or Congressman that we could find who was interested, both in

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this committee and others. We talked with Senator Javits' staff and, of course, with Senator Glenn who then was subcommittee chairman.

We also distributed our position papers to other staffers on the Senate Foreign Relations Committee. We did the same with the Senate Energy Committee and the Senate Armed Services Committee.

On the House side, we consulted mostly with the House Foreign Affairs Committee. But I knocked on many doors personally here on the Hill wherever I could find anyone interested.

Senator HAYAKAWA. Thank you. From an American point of view, the principal advantage of these treaties with these new nations is the protection and maintenance of our fishing rights there; is it not?

Ambassador BODDE. And the political relationship.

Senator HAYAKAWA. Political relationship? In case there is any kind of difficulty in the Pacific?

Ambassador BODDE. Well, not just in case there are any kinds of difficulties, Mr. Chairman, but in fact, this part of the world is one of the most pro-American, pro-Western, anti-Soviet parts of the world, and these treaties are supportive of the kind of support we get from these nations. Not all of them belong to the United Nations, but those that do most often vote with us in the United Nations.

Senator HAYAKAWA. Which of these nations belong to the United Nations?

Ambassador BODDE. Of the new South Pacific nations, Fiji, Western Samoa, Papua New Guinea, Solomon Islands, and Vanuatu are in the United Nations General Assembly. Except for New Zealand, none of the island nations we have concluded these treaties with are members of the UNGA, although some are members of various specialized agencies of the United Nations.

The island nations have taken positions on Afghanistan opposing the Soviet invasion. In their own regional organization—the South Pacific Forum—the island countries reversed the decision made by a U.N.-sponsored technical committee on Oceanographic Research and refused to have a Soviet vessel do the major research in the area.

They are very supportive. None of these countries has permitted a Soviet embassy in its territory. Some of them have relations with the Soviet Union, but they will not allow the Soviet Union to open a diplomatic mission in their capitals, for example.

Senator HAYAKAWA. I see. So that—with several of the governments in that region we have looked forward to cooperating on conservation, development, utilization, and exploitation of fisheries resources. This is a continuing process?

Ambassador BODDE. Yes.

Senator HAYAKAWA. We cooperate with them in research on conservation as well as harvesting?

Ambassador BODDE. Yes. Our particular vehicle for fisheries cooperation has been the South Pacific Commission, where we make a special contribution for tuna research. They are very interested in that, and so are our California fishermen.

Senator HAYAKAWA. Of course. Well, I am glad we are on friendly terms with them in these matters.

Finally, you mentioned in your testimony Swains Island. It seems from your statement that this might be the only clear-cut case where

American sovereignty arises, and it seems to be safeguarded. Is that correct?

Ambassador BODDE. I think this is the only case where we have undisputed sovereignty because of annexing Swains land to American Samoa.

Senator HAYAKAWA. Is that right?

Mr. FORTUNE. That is correct, Mr. Chairman. In contrast to the other 25 islands, over which we never acquired sovereignty, in the case of Swains, we made a formal proclamation by act of Congress in 1925, annexing it to American Samoa.

Senator HAYAKAWA. So it is part of American Samoa by law now?

Mr. FORTUNE. Yes. And so recognized by the treaty with New Zealand with respect to Tokelau.

Senator HAYAKAWA. Thank you, Mr. Fortune, thank you, Mr. Bodde. May I turn to Admiral Jones at this point.

Admiral Jones, in your prepared statement you mentioned the treaties we are considering preserve U.S. strategic interest in the region. Would you elaborate on this and tell the committee what the Defense Department views as our strategic interest in the region?

Admiral JONES. Our interests in the region are best served by continuing stability. In other words, a sense of calm in the region serves our strategic interests, and it is not required to be supported by physical presence.

We are comfortable with the treaties because the consultative process they include would give some opportunity, along with our relationships with Australia and New Zealand, to provide for our needs, our defensive needs in the area.

Senator HAYAKAWA. These island nations are too far away from the sea lanes that bring oil from the Persian Gulf to Japan and Taiwan and so forth?

Admiral JONES. That is correct.

Senator HAYAKAWA. That is not involved?

Admiral JONES. No, sir.

Senator HAYAKAWA. You mentioned that third party use of the islands would require prior consultation with our government. What third parties might conceivably in the future ask for use of those islands?

Admiral JONES. The Ambassador could address this better than I. I know of no one at this time, but I believe that umbrella is a very good protection.

Ambassador BODDE. Mr. Chairman, we did not envision when we were putting the treaty together that there was a likelihood that there would be third party interest. But particularly, on places like Canton where we had built facilities, we did not want some eventuality to result that our facilities could be used by a potential adversary. So we put this in.

Senator HAYAKAWA. In all these questions, gentlemen, including Mr. Fortune and Mr. Colson as well as the three who have testified, please feel free to pitch in when you have something to contribute.

Admiral Jones, you mentioned the facilities that the United States has constructed on several islands: Canton, Enderbury and Hull. What are these facilities, and for what purpose do we use them, and do we

need them any longer? You mentioned the possibility exists that we might use them at some future date. What are these facilities, and what are their possible uses in the future?

Admiral JONES. The facilities—and the Ambassador may be more specific with this, but they were used for missile testing in the early seventies and have not been used for that purpose since.

The structures themselves were perhaps left over from World War II, and there has been minimal new construction to support that missile testing venture. They were left in a caretaker status for a number of years at some expense. This did not seem to be prudent in the later years, and so even that status was abandoned.

Senator HAYAKAWA. Admiral, you mentioned the ANZUS Treaty in your statement; how do you envision the ANZUS Treaty would play a part in safeguarding our interests in the area covered by these treaties? Our relations with Australia and New Zealand are excellent; are they not?

Admiral JONES. That is correct. Therefore, the responsibility to prevent any outside incursion from an unfriendly power in the area, for defense of that area, would develop from support between Australia, New Zealand and the United States through the ANZUS Treaty to provide whatever was necessary to deter that encroachment.

Senator HAYAKAWA. Thank you, gentlemen, thank you very much for your thoughtful answers to the questions that I had. You may now be excused, and I shall now ask Governor Coleman to come forward.

Governor Coleman, you are most welcome. We are happy to have you with us. If you have a statement, go ahead.

STATEMENT OF HON. PETER T. COLEMAN, GOVERNOR OF AMERICAN SAMOA, PAGO PAGO

Governor COLEMAN. Thank you, Mr. Chairman, I have a brief statement that perhaps I could highlight in the interest of time.

First of all, I am very grateful for the opportunity to appear here. The Pacific Island areas, as indicated in the previous testimony, are undergoing rapid political changes. And with these political changes, also are the economic development concepts that are being worked out.

The U.S. territory of American Samoa is the only U.S. territory south of Equator, deep in the South Pacific. It works very closely with these island areas, as well as with their leaders.

American Samoa's location and involvement within these island areas enables us to work closely in regional development, regional cooperation programs. The treaties under consideration were negotiated by representatives of our State Department and American Samoa was a participant and observer during part of these negotiations.

It has been said that the Pacific area is one-third of our planet.

Senator HAYAKAWA. Excuse me for a moment, but where are the Cook Islands and Tokelau. Where is American Samoa?

Governor COLEMAN. American Samoa is west-northwest of Cook Islands.

Senator HAYAKAWA. Northwest of Cook Islands?

Governor COLEMAN. Yes. It is south of Tokelau.

Senator HAYAKAWA. Around in here?

Governor COLEMAN. Right.

Senator HAYAKAWA. Thank you. Please proceed.

Governor COLEMAN. For your information, Mr. Chairman, American Samoa became a territory of the United States in 1900 under a treaty of cession which has been considered as a treaty of friendship by our own people. So American Samoans are fiercely loyal to the United States.

Because of the size of the Pacific Ocean, we can see that there is a solid belt of islands all the way from the Asian shores all the way down to the western reaches of South America. This belt of islands constitutes what can be a very important potential for development of fisheries in the area.

American Samoa has two canneries. These are the two canneries from California: Starkist and Van Camp, and they depend on their raw materials for fish on the fishing in most of these island areas, all the way from Papua New Guinea down to the Cook Islands, almost over to Easter Island, and Tahiti and the Marquesas.

So, our friendship with these islands is very important, particularly if the signing of the treaty would come about. It would strengthen our own position in the area as a member of the island community in that part of the South Pacific.

The success, of course, of the canneries will depend upon the fish. Lately, we have been very fortunate with fishing. American Samoa has come up with an estimate of possibly $180 million worth of fish products that will be exported this year to the U.S. economy.

Senator HAYAKAWA. There are no canneries in these other islands?

Governor COLEMAN. No canneries in the other islands.

Senator HAYAKAWA. The canneries are simply in American Samoa?

Governor COLEMAN. Yes, sir. And what we are doing and working closely with these island countries, Mr. Chairman, is to convince them that if we have a proliferation of canneries in this particular area, we will all go down together. Whereas, if we look realistically at the fact that the canneries in certain strategic areas can be successful, the two canneries at American Samoa can be a marketplace for the fish of these island countries.

This is one of the concepts that we are developing as far as helping them with economic growth in those areas. We do feel in American Samoa that political growth is enhanced if there is sufficient economic growth. It goes along with it. And we are lending our hand in helping and working very closely with them.

We are offering, for instance, the services of our port in transshipment of cargo from the big island, the big country areas like the United States, Australia, and New Zealand, to the American Samoa which has one of the most beautiful and safe harbors in the world, or in that part of the Pacific.

We also have the reputation of having one of the highest security areas for the cargo. But by bringing the cargo into a central area, which is a new concept we are developing now, we centralize this flow and we route this flow by the big ships in the central area, and use the smaller vessels owned by the island countries to come in and pick up their cargo.

In that way, we have known that it would cut the cost of goods delivered to the people, as well as the time that it takes.

We also have a supply of oil out of American Samoa now that is being used to entice some of these fishing vessels to come to American Samoa. So as you can see, Mr. Chairman, we are very supportive of these treaties, because these treaties mean a lot to us as a territory to stand on our feet as well as protect the interest of the United States in their long friendship with these people, and also, some of our fishing industries from the west coast.

I also would like to express my appreciation to Ambassador Bodde and his and the State Department's staff, and all those who support the negotiations. They were very sensitive and delicate negotiations at the time, but the particular personalities that have been brought into deal with the island people have resulted in a very good feeling of friendship.

So, Mr. Chairman, it is my humble request that these treaties be favorably considered. Thank you.

[Governor Coleman's prepared statement follows:]

PREPARED STATEMENT OF HON. PETER T. COLEMAN

One feels the greatness of our country in the honor given me to participate in this hearing. I am indeed deeply grateful for the opportunity to urge the approval of these treaties.

The Pacific Island areas are undergoing rapid political changes and maintaining the long friendship that the United States has had with these island countries is important to all the parties concerned.

The U.S. Territory of American Samoa works closely with these new island nations and their leaders. American Samoa's location and involvement within these island areas enables us to do this. The treaties under consideration were negotiated by representatives of our State Department and American Samoa was an observer during part of these negotiations.

It has been said that the Pacific Ocean area is one-third of our planet. If we are to look at the map we see a solid belt of islands dotting the whole Pacific Ocean almost all the way from Asian shores to the western reaches of South America. The potential of development of the marine resources is vast.

American Samoa has had two canneries operating in the Territory for the last 25 years. These canneries supply the United States market and constitute the only main economic base for the Territory. The success of the canneries strengthens our economy. This success depends on the availability of tuna fish from the waters of these island areas. There are other concepts for economic development being worked out to the mutual benefit of these island areas as regional entities. These concepts include exploration of feasibility of re-routing the cargo ships to central areas and distribution of cargo then could be made more quickly and at lower cost by the use of small feeder vessels owned by these island countries. Signs of success are showing the concepts for improving the standards of living of these far-flung islands are taking hold.

Ambassador Bill Bodde and representatives of the State Department have worked hard on these negotiations and they have done an outstanding job.

Mr. Chairman and members of this Committee, it is my opinion that these treaties have been so fashioned to recognize the dignity of these island countries and their people and speak well for the greatness of our country. I respectfully urge their approval.

Senator HAYAKAWA. Thank you, Mr. Governor, we are very grateful to you for your contribution to our discussion. It is useful to us to have the views of the senior elected American official on the scene in the Southern Pacific. It has been very valuable to have you here.

I have two final questions. Is tuna the only harvest that you have? Do you can anything else?

Governor COLEMAN. Yes; tuna is the only harvest that we have. We have miscellaneous fish, too, that they catch. There are two methods of catching: one by long lines which catches the albacore type of tuna, and then we have the purseseiners. These come from the west coast, from San Diego. They are caught by the use of nets, and mainly they catch the skipjack and yellowfin tunas.

So sometimes these nets and these long lines bring up other types of fish, but the main source of raw material——

Senator HAYAKAWA. But the other types of fish are not commercially important?

Governor COLEMAN. No, sir.

Senator HAYAKAWA. Except locally maybe?

Governor COLEMAN. No, Mr. Chairman.

Senator HAYAKAWA. All right. One last question. You have urged the ratification of these treaties. Could you give us your judgment of these treaties. Could you give us your judgment as to what the consequences would be if these treaties are not ratified?

Governor COLEMAN. If these treaties are not ratified, there will be a feeling of letdown among the people of the islands.

Senator HAYAKAWA. Who depend upon——

Governor COLEMAN. Yes. You see, there is a feeling of kinship in all these island areas, and bigger countries like Fiji or Papua New Guinea and Vanuatu and the Solomon Islands, they are all watching what this big country of the United States will do in dealing with the small island areas.

So, the way we handle these treaties will have a bearing certainly on the continuing friendship that the people of those areas have for us.

Senator HAYAKAWA. Thank you very much, Governor Coleman. You bring a unique perspective to this problem from your position as Governor of American Samoa. I am very grateful to you, indeed. You are excused now, and I would like to hear from a fellow Californian who was asked to testify, Mr. Mark Seidenberg, who was a student at San Francisco State College when I was there as President, and I became well acquainted with him because he helped me in resisting the radical left. He is a right wing nut, like myself. [Laughter.]

Anyway, I look foward to your testimony, Mr. Seidenberg, very much.

STATEMENT OF MARK JEROME SEIDENBERG, PRESIDENT, SOCIETY FOR THE PROTECTION OF AMERICAN SOVEREIGNTY, LOS ANGELES, CALIF.

Mr. SEIDENBERG. Thank you very much, Senator. I might not agree with you about the "nut" part.

Senator HAYAKAWA. You know I am teasing you.

Mr. SEIDENBERG. First of all, I request that my statement be placed in the record without reading it, and then proceed with a summary, if that is all right.

Senator HAYAKAWA. Without objection, so ordered. You want the full statement included in the record.

Mr. SEIDENBERG. That is correct, please.

Senator HAYAKAWA. It will be so ordered.

Mr. SEIDENBERG. Thank you. First, I will tell you a little about myself. I first became interested in the area in 1963 when I was cruising the area with my mother while I was in high school. I have been fascinated by the history of these islands ever since that time.

Before graduating from San Francisco State College, I was a student at the University of Hawaii, which gave me access to the Bishop Museum, and I had access to the Mitchell Museum in Sydney and had been in Europe at the Foreign Commonwealth offices, and I had access to the historical records of these areas for the last decade or more.

I basically am concerned with the general retrenchment of the United States in this area, the massive increase—the Soviet increase in the area.

As my statement will indicate, the Soviets have been very active in the last few years. Let's take the Cook Islands as an example.

Senator HAYAKAWA. The Cook Islands?

Mr. SEIDENBERG. The Cook slands for example. Sir Albert Henry, who was a former Premier before Dr. Thomas Cook, was the head of the Cook Island Party. He was trained according to the present Premier, Mr. Davis, by the New Zealand Communist Party, which is pro-Soviet.

In 1976 I informed the State Department of information I received that the Soviet research "spy" ship *Kallisto* was to be going to what is known as the guano islands, or American Polynesia, to carry out research projects. I was wondering since the United States claimed sovereignty which I contend they do claim—I had better backtrack, Senator.

As you might recall, I wrote my master's thesis on the paramount claims of the United States to these islands, and applicable U.S. law to the territory in question.

At any rate, to backtrack to what I was just saying, in 1977 the *Kallisto* went to Puka Puka, for example, which is one of the islands that we are going to be turning over the Cook Islands if that treaty is in turn ratified, to carry on scientific experiments. It also went to Suwarrow, according to the reports that I received, to check the coral deposits in the lagoon at Suwarrow.

Now, Penrhyn, which is one of the islands we are going to be turning over to the Cook Islands, has the only other large lagoon besides Suwarrow that could hold a Soviet fishing fleet. The Soviets had been eyeing the area, so therefore, with the past connection with the Cook Islands and the Soviet Union, and the New Zealand Communist Party connection with the Cook Island Party, I am very concerned in that area.

The present Prime Minister of Kiribati, Ieremia Tabai, was published in the Pacific Island Monthly I believe in May or June of 1979 saying "If the Russians come to the Gilberts, later to become Kiribati, we will talk to them and not send them away."

I understand that the rationale for leaving Canton was not that the Department of Defense did not want it anymore; it was that they were told by the State Department that Mr. Tabai did not want the United States to be there anymore unless they paid rent for the use of its bases on Canton.

I just want to give you an example of the U.S. historical claim of sovereignty to the area. Capt. John Stetson of New Haven, Conn.,

landed at Christmas Atoll—which is the largest atoll in the world—from the American ship *Equator* on February 15, 1825. Finding it not occupied, he claimed the island for himself. Basically that was an allodial title.

Through the Guano Island Act, which, if you could read my prepared statement, goes on as to how he deeds, transfers title from one person to the other.

What settled on U.S. sovereignty was not the Guano Islands Act, which at least I believe it was, was the United States formally annexed Christmas Island on July 20, 1872. On July 20, 1872 the U.S. commander, Richard W. Meade of the U.S.S. *Narragansett*, formally annexed Christmas Atoll for the United States of America. He acted on authority vested in him by the Department of the Navy.

The U.S. Supreme Court, in *Jones* v. *United States*, which I cited in my statement, said that these islands are under the sole jurisdiction of the United States and not under the jurisdiction of any other government.

British claims to the area really date back to 1885, when the Germans and United Kingdom entered into a secret treaty to divide the Pacific up to separate spheres of influence between Britain and Germany.

In 1877, the Colonial Conference decided that they wanted to set up a Pacific cable, and they thought these islands might be of use to them. So basically, Britain ordered some British naval commanders to go around and annex a lot of U.S.-claimed islands.

If it was the United States intent to just give up these islands without having peace in the area because we have a conflict in claim, then why are we not giving up other islands, Kiribati, for example, claims that are not included in the treaty?

The United States claims islands like Butaritari, Makin and Little Makin, Marokai or Washington and Fanning, which are not mentioned in the treaties, yet are clearly on the guano island list which the Treasury Department has. I can give the Senator, if he is interested, after this committee hearing or any time during it, a ruling from the Customs Office claiming that these islands are in the U.S. law and have been. There are examples in my statement.

There were statements made that the United States has never administered these islands. They have administered these islands for both the U.S. consulates in Apia Samoa in the 19th century, and the U.S. consulate in Tahiti. They had court cases. I do not know if the Senator was aware of it, but until 1940 there used to be U.S. consular courts who had basically extraterritorial functions, but also had acted as courts of record for the United States.

One case comes to mind right now. That is the case of *Hughes* v. *the King of Bowditch*, which is cited in my prepared statement, where the U.S. consular court at Apia assumed jurisdiction as court of record of the United States in relationship to the Tukelau Islands, claiming that they were in the jurisdiction of the United States under U.S. sovereignty, and that is why they are having jurisdiction in this case.

Another thing that was brought up is that the island people want the United States to give them independence. I have a letter, which is the only appendix I attached to my statement, that was issued in 1975 by H. Rex Lee, who is the former Governor of American Samoa. He informed me that in 1962 or 1963 the chiefs of the Tukelau Islands

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came to his office and asked to talk with him, and informed him that they want to be associated with American Samoa and be annexed to American Samoa, similar to Swains Island which is also part of the Tukelau, Senator. They did not feel that their people should be divided from the rest of American Samoa.

This basically clearly shows the United States has a longstanding claim, and that these islands are very important to the United States.

One other thing I think we should go into is the value of bulbous nodules accreted with manganese cobalt zinc. These waters are filled with them. The United Nations, in the last few years, have been setting up experimental stations. They have been finding these nodules, and some of them has been as high as 85 percent manganese dioxide.

As you know, Senator, 98 percent of the U.S. manganese, which is vital to our steel, is imported into the United States. This is clearly the only domestic source of manganese.

Back to the fishing issue for an example, when the U.S. Government set up in 1976 the Fisheries Conservation Act, all these islands which we would be giving away were included in those fishery zones, so American Samoa had no trouble fishing from the area. If the United States continues to assert its claims of sovereignty to the islands, then we assert our 200-mile fishery conservation zone and our fishing rights are protected. But giving away these islands to them—who knows what is going to happen to our fishing sources? American Samoa is very important to this area.

I would like to open it up to questions from the Senator, if he has any, to go into more details about the Soviet influence in the area, because it is important. That was the main reason, to my understanding, why they were talking about third parties.

Thank you.

Senator HAYAKAWA. Thank you, Mr. Seidenberg.

Your paper that you prepared for this hearing as president of the Society for the Protection of American Sovereignty is extraordinarily learned, extraordinarily thorough, extraordinarily well documented, and I congratulate you on it.

Mr. SEIDENBERG. Thank you.

[Mr. Seidenberg's prepared statement follows:]

PREPARED STATEMENT OF MARK JEROME SEIDENBERG

Mr. Chairman and Members of the Subcommittee on East Asian and Pacific Affairs: My name is Mark Jerome Seidenberg, President, Society for the Protection of American Sovereignty. The Society for the Protection of American Sovereignty has been asked to present its views on Executive W (96th Congress, 1st Session), an inchoate treaty, "Treaty of Friendship with Tuvalu"; Executive A (96th Congress 2nd Session); an inchoate treaty "Treaty of Friendship with the Republic of Kiribati"; Executive P (96th Congress, 2nd Session), an inchoate treaty, "Treaty with the Cook Islands on Friendship and Delimitation of the Maritime Boundary", and Treaty Doc. 97–5, an inchoate treaty, "Treaty with New Zealand on the Delimination of the Maritime Boundary Between the United States of America and Tokelau."

The essence of these treaties are to cede 26 U.S. sovereign Pacific Atoll ,[1] without the approval of the House of Representatives as required by Art. IV, Sec. 3, Cl. 2, of the U.S. Constitution.[2] Each of these strategically located atolls

[1] Islands to Tuvalu: Funafuti, Nirlakita, Nukufetau, and Nukulaelae, Islands to Kiribati: Canton, Enderbury, Hull, Birnie, Gardner, Phoenix, Sydney, McKean, Christmas, Caro'line, Starback, Malden, Flint, and Vostok. Islands to the Cook Islands: Pukapuka, Manikiki, Nassau, Rakahauga, and Penrhyn, Islands to New Zealand: Atafu, Nukononu, and Fafaofa.

[2] Hearings before the Committee on Merchant Marine & Fisheries, House of Representatives, 95th Congress, 2nd Session, Serial No. 95–32, "Power of Congress to Dispose of U.S. Property."

has an economic zone with a radius of 200 miles,[3] totaling almost four million square miles of ocean, rich in tuna (canning tuna from these fishing grounds is the only major industry in American Samoa) and bulbous nodules accreted with manganese (assaying as high as 80 percent manganese dioxide),[4] copper, nickel, cobalt zinc and molybdenum.

It is the view of the Society for the Protection of American Sovereignty that these four giveaway treaties will erode American influence in the face of a growing Soviet presence in the South Pacific and would irretrievably injure the fishing industry of American Samoa. Therefore, the Society for the Protection of American Sovereignty *opposes* Executive W (96th Congress, 1st Session), Executive A (96th Congress, 2nd Session), and Treaty Document No. 97–5.

TREATY OF FRIENDSHIP WITH TUVALU, EXECUTIVE W (96TH CONGRESS, 1ST SESSION)

This inchoate treaty, as presently written, would cede to the Government of Tuvalu four atolls under actual U.S. Sovereignty since the early 1800's, i.e., Funfuti Atoll, Nukufetau Atoll, and the islands known as Nukulaelae (or Nukulailai), and Nuilakita (or Narakita).

It appears that former Secretary of State Cyrus Vance was not properly briefed on the history of these U.S. Sovereign South Pacific atolls, when he obfuscated their historic connection with the rest of the United States in his following statements:

> The islands were discovered in March 1819, by an American merchant vessel. During 1940–41 the four islands were mapped by the United States exploration expedition under Commander Charles Wilkes, United States Navy. The United States first formally declared sovereignty over the islands in 1939. During World War II the United States built and manned military bases in Funafuti and Nukufetau, but these were abandoned after the War, and the United States established no other presence on the islands.[5]
>
> The United States took no action to dispute the British claim for almost a half century following the 1892 British proclamation of protectorate status for the Ellice Islands. To our knowledge the only resource in the area are the fisheries located off shore.[6]

These statements by former Secretary of State Vance were not correct and needs clarification. The following facts will correct the errors stated by Vance in the aforementioned "Letter of Submittal."

Funafuti is a pear-shaped atoll enclosing a lagoon about 16 km long by 13 km wide at its widest part. There are about 30 islets on the reef. On the eastern (windward) side, the islets form an almost continuous line, but on the western side there are many gaps. Nukufetau is an oval-shaped atoll, about 38 km in circuit, with 37 islets on its reef. Nukulaelae is an atoll with about two dozen islets, of which the own largest are on the eastern side. The reef on the western side is largely submerged. Nuilakita is slightly higher than the other three atolls. It is about 5½ km in circumference and wooded with coconut palms. These four atolls were known by the American whalers in the 1800's as lying in the waters known as the "on-the-line-grounds." The main island, Funafuti, is 1200 km north of Suva.

The people of these atolls are of Polynesian origin (mostly arriving from other island groups after the 1860's). The pre-1800's Polynesian inhabitants were mostly

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[3] While the United States does not at present "officially" recognize a 200 mile exclusive economic zone around said 26 atolls (Fishery Conservation and Management Act of 1976), the governments of Tuvalu, Kiribati, Cook Islands, and New Zealand claim a 200 mile exclusive economic zone around their territories (a fortiori, their claims to a 200 mile exclusive economic zone will be extended around said 26 atolls (noting the exceptions in Article III of Executive P, 96th Congress, 2nd Session and Article III of Treaty Doc. No. 97–5), if these inchoate treaties are ratified).

NOTE.—The State Department informed the Coordinating Committee for Joint Off-Shore Prospecting for Sea-bed minerals in the South Pacific (COOP/SOPAC), a body to which the aforesaid "Oceanica" (a la mode de Orwell's *1984*) government are members (COOP/SOPAC is under the auspices of the United Nations Economic and Social Commission for Asia and the Pacific), that it would not "contest" the 200 mile exclusive economic zone claimed by the COOP/SOPAC members (source was a statement by the Rt. Hon. D. S. Thomson, Acting Minister of Foreign Affairs of New Zealand, dated: 19 June 1981 and Pacific Islands Monthly—August, 1981, p. 5).

[4] Manganese metal is an important resource for the manufacture of all steels. According to the Bureau of Mines, U.S. Department of the Interior, 98 percent of the apparent consumption of manganese in the United States are imports (mainly from Gabon, Brazil, and South Africa).

[5] Cyrus Vance, Secretary of State, "Letter of Submittal," *Treaty of Friendship With Tuvalu*, Executive W (96th Congress, 1st Session), p. V.

[6] Same as footnote 5.

kidnapped by Peruvian slavers in the years 1862–63. None returned.[7] But many now have some American blood, derived from the beachcombers and traders who settled in these atolls in the 19th century.

The first of these atolls became known to the western world was Nuilakita. This was sighted by Alvaro de Mendana during his (second) voyage from Tahuata to Ndeni on 29 August 1595.[8]

However, Mendana's discovery of "La Solitaria" (Niulakita) atoll had been forgotten by the time the American Captain George Barrett rediscovered "Rocky Island" (Niulakita) on 9 November 1921.[9]

According to the Calcutta Journal of 7 August 1819, the American Captain Arent Schuyler de Peyster (master of the British Brigantine *Rebecca*) discovered Funafuti (Ellice's Group) on 17 and 18 May 1819, respectively, while on a voyage from Taiohoe to Calcutta.[10]

Captain George Barrett of the Nantucket Whaler *Independent II*, discovered Nukulaelae (Mitchell Group) and (re-)discovered Niulakita (a.k.a. Rocky, Independence and Sophia).[11]

Between 1821 and 1870 the "on-the-line-grounds" were frequently visited by American whalers. Seamen from these American ships occasionally deserted and became beachcombers and traders or agents for firms in the United States.[12]

Niulakita atoll, the highest of these four islands, has a historic American connection similar to the other 3 atolls. Because of space considerations in this statement, I will limit my discussion to Niulakita atoll as an example of the American claims to the entire group covered by this inchoate treaty.

The American trader Harry Jay Moors[13] acquired Niulakita (then called Sophia) atoll late in the 19th century. He exploited the island for copra and its guano deposits. Moors recorded this title to Sophia atoll with the U.S. Consular Court at Apia, Samoa. His daughter Sophia was born on the island.

Moors sold his two-thirds interest in Niulakita to the Samoa Shipping and Trading Company for £1,500 on 27 January 1914. As it was then mortgaged to W.H. and A.G. Friend of Sydney for £12,000 it was simultaneously reconveyed to Moors for £1,500. On 30 November 1926 the Official Liquidator of the Samoa Shipping and Trading Company conveyed said two-thirds interest to Burns Philp for £1,200.[14] During World War II Burns Philp sold its two-thirds

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[7] Harry E. Maude. *Slavers in Paradise: The Peruvian Labour Trade in Polynesia, 1862–1863*. Stanford: Stanford University Press, 1981.

[8] Sir Clements Markham. *The Voyages of Pedro Fernandez de Quiros, 1595–1606*. 2 Vols. Hakluyt Society, Series II, Nos. 14–15. (London: The Hakluyt Society, 1904). Vol. I (No. 14), pp. 31–32.

[9] *Salem Courier*, 18 March 1829.

[10] *Calcutta Journal*, 7 August 1819. Secretary Vance errored when he asseverated that all four atolls "were discovered in March 1819, by an American merchant vessel". On 25 February 1949, Richard Holbrooke (Bureau of East Asian and Pacific Affairs, Department of State) wrote the Hon. Henry Waxman, M.C. (24th District, California) on the subject of the Tuvalu Treaty. Holbrooke at that time asserted that Captain De Peyster (sic) of the American (sic) ship *Rebecca* discovered all four atolls in 1919 (sic). It is therefore very clear that the Department of State does not know who discovered these four atolls and wants to obfuscate American historical sovereignty over these islands in a "memory hole" (a la Orwell's *1984*).

[11] *Salem Courier*, 18 March 1829.

[12] Edouard A. Stackpole. *The Sea-Hunters* (Philadelphia: J. B. Lippincott, 1953).

[13] Harry Jay Moors was born in Detroit, Michigan in 1854. His family moved to San Francisco where he graduated from high school in 1870. In 1875 he visited Samoa and went to work for the Hawaiian Government as an agent of the Hawaiian Board of Immigration (H.B.I. Overseas agents had extraterritorial powers in the independent atolls of Oceanica to enforce the anti-Blackbirding laws of Kingdom of Hawaii), in the Gilbert and Wallis Islands. In Wallis he had an affair with the king's daughter which begot a son named Kane. Early in the 1880's Moors moved to Apia and had an affair with Epenesa Enari and sired his second son called Mark. On 10 July 1883, Harry Moors married Fa'animonimo (Nimo) Asiono, of Tanugamanono, before the United States Consular Court at Apia (a court of Record of the United States). Moors had six children with "Nimo" (Daniel Walker [died as infant in 1887], Ramona [Mirada], Rosabel [Nelson], Sophia [Hellesol], Priscilla [Cathuthers-Hetherington], and Harry Jr. [Afoafouvale Misimoa]).

Harry Moors recorded all eight of his children's births with the U.S. Consulate at Apia and sent them to the United States for their education (this protected his grandchildren's rights to United States citizenship).

Moors passed on 13 March 1926. His wife "Nimo" died in 1932.

[14] Copies of the bills of sales should be resolved in the British Consulate, Apia, Post Records, 1847–1912, now in Wellington at the National Archives and available on microfilm (78 reels), or in the case of 1926 conveyance in the Western Pacific High Commission Archives, now at the Foreign Office in London. The latter should also be available on microfilm.

interest to the Western Pacific High Commission on behalf of the Ellice islanders. Therefore, one-third interest in Niulakita is presently owned by American citizens.

The present government of Tuvalu does not recognize the one-third interest of these United States citizens in Niulakita atoll. If the treaty takes force a few U.S. citizens shall suffer diminution of their rights and privileges to the one-third interest in real property on Niulakita atoll.[15]

The legal status of the other three atolls are that its fee belongs to the United States and their autochthonal polynesian population has only a mere right of occupancy.[16]

During World War II the United States built and manned military bases on Nukufetau and Funafuti. Secretary of State Vance errored when he stated these two United States military bases "were abandoned after the War." I know of no act on the part of the U.S. Government to abandon its bases on Funafuti and Nakufetau. The fact that after World War II the U.S. Government did not have to man these bases, does not show in a legal sense the abandonment of the U.S. rights to these bases.

Vance errored when he stated the U.S. took almost a half century following the 1892 British proclamation of protectorate to dispute the British claims.[17] The U.S. Government protested the British proclamation as early as 1892, i.e., not a half century later.[18]

TREATY OF FRIENDSHIP WITH THE REPUBLIC OF KIRIBATI, EXECUTIVE A (96TH CONGRESS, 2D SESSION)

This inchoate treaty, as presently written, would cede to the Government of the Republic of Kiribati 14 atolls under actual U.S. Sovereignty since the mid-1800's, i.e., Birnie, Canton, Caroline, Christmas, Enderbury, Flint, Gardner, Hull, McKean, Malqin, Phoenix, Starbuck, Sydney and Vostok.

It appears that former Secretary of State Cyrus Vance was not properly briefed, on the history of these U.S. Sovereign South Pacific atolls, when he obfuscated their historic connection with the rest of the United States in his following statement:

> The British originally asserted sovereignty to these islands at the end of the 19th century . . . The United States did nothing to contest British sovereignty until 1939. That year the United States, in a diplomatic note to the United Kingdom, formally asserted a claim to the 14 islands in the Phoenix and Line Island groups and 11 other South Pacific islands.[19]

These statements by former Secretary of State Vance were not correct and needs clarification. The following facts will correct the errors in fact stated by Vance in the aforesaid "Letter of Submittal."

The Phoenix islands comprises eight scattered atolls lying between 2 deg. 30 min. and 4 deg. 30 min. S. lat. and between 170 deg. 30 min. and 174 deg.

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[15] In light of U.S. Law.

[16] Cf. *Federal Power Commission vs. Tusarora Indian Nation*, 362 U.S. 99 (1960), and *Johnson vs. McIntosh*, 8 Wheat. (21 U.S.) 543 (1823).

[17] In the Holbrooke letter (see footnote #10) the State Department errored when he said, "The first recorded British claim to the islands was by Captain Davis of the H.M.S. *Royalist*, who proclaimed a protectorate over the island (sic) in 1892." However, according to the *New York Herald* of 3 September 1892, Captain Edward H. M. Davis of the H. M. S. screw cruiser *Royalist* proclaimed a protectorate only over the Gilbert Islands, while at Apamama on 27 May 1892.

It is therefore very clear that at the time this treaty was being negotiated (between September 1978 and February 1979) the State Department did not have the facts straight as to the origin of the alleged "British Claims" to these four atolls.

Captain H.W.S. Gibson of the H.M.S. *Curarao* went to these four islands in 1892 and proclaimed a British protectorate over them. At Niulakita for example, Captain Gibson had a member of crew tear down the stars and stripes (U.S. Flag) off the island's flagpole (over the protests of H. Moors' employees) and replace it with the Union Jack (British flag). These British claims of protection were fifty-two years too late, i.e., these islands because U.S. territory in 1840 by discovery and occupation (the U.S. Exploring Expedition under the command of Lt. Charles Wilkes U.S.M. completed said occupation for the U.S. Government in 1840). See: *Jones vs. United States*, 137 U.S. 202, 212 (1890), when the Supreme Court said: "By the law of nations recognized by all civilized States, dominino of new territory may be acquired by discovery and occupation, as well as by cession and conquest."

[18] *New York Herald* of 3 September 1892.

[19] Cyrus Vance, Secretary of State, "Letter of Submittal" (17 December 1979), *Treaty of Friendship With the Republic of Kiribati*, Executive A (96th Congress, 2nd Session), p. V.

30 min. W. long. The islands are Canton, Enderbury,[20] McKean,[21] Birnie,[22] Phoenix,[23] Gardner,[24] Hull,[25] and Sydney.[26] The remaining six islands are located in the Line group and comprise of the following atolls: Caroline,[27] Christmas, Flint,[28] Maldin,[29] Starbuck[30] and Vostok.[31] The Line Islands begin about 1,500 kilometres south of the Hawaiian group and run in a string of low atolls in a SSE direction towards Tuamotu Archipelago.

Because of space considerations in this statement, I will limit my discussion to Canton and Christmas atolls as an example of the American claims to those 14 atolls of American Polynesia.

Canton is the largest of the Phoenix Islands, tapering from a width of four and a half miles on the west side to the southwest point, about ten miles dis-

[20] Enderbury Island lies about 60 km. ESE of Canton Island. It is about 4½ km. long by 1½ km. wide. The lagoon that once existed is now only a shallow puddle. The island was first surveyed by the United States Exploring Expedition in 1840 and 1841.

The Phoenix Guano Company, an American concern, worked the island's guano deposits between 1859 and 1877.

On 3 March 1938, President Franklin D. Roosevelt issued Executive Order 7828 which placed Enderbury atoll under the control and jurisdiction of the U.S. Secretary of the Interior. In April, 1939 the island was placed under joint British and American control. On 12 July 1979, said joint control ended and its sole control reverted back to the Interior Department.

[21] McKean atoll is almost circular with a diameter of little more than 1 km. It has a shallow lagoon. The island was named for a member of the United States Exploring Expedition who was the first to sight it during a survey in 1840 for the U.S. Navy's Depot of Charts and Instruments (under Congressional authority). The island has not been occupied since American guano interests ceased operations there about 1871.

[22] Birnie is the smallest of the Phoenix group, being only about 1¼ km. long and 500 metres wide and enclosing a salt water lagoon.

[23] Phoenix atoll is a pear-shaped island less than 1¼ km long and 1 km wide. A plateau at one end of the island, about six metres above sea level, slopes away to a shallow lagoon. The island is uninhabited and is overrun with rabbits. There are also many thousands of sea birds.

[24] Gardner atoll is about 6½ km by 2 km, enclosing an ample lagoon. The width of the land varies from about 100 metres on the east and northeast side to about 1 km on the west. There are two narrow passages into the lagoon. The island has a brown, peat-like soil that is very fertile. Pisonia grandis and cordia subcordata grow prolifically there.

[25] Hull atoll lies eastward of Gardner and is about 11 km long by 5 km wide. There are numerous small islets on the reef and many entrances into the big lagoon.

Stone structures found on the island in 1933 indicate that it was inhabited long before it was discovered by Lt. Charles Wilkes of the United States Exploring Expedition in 1840. Wilkes named the atoll after Capt. Isaac Hull, U.S.N., commander of the *Constitution* ("Old Ironsides" during the War of 1812). Hull was the only one of Phoenix Islands that was still inhabited when the U.S. Exploring Expedition first charted the Phoenix Islands in 1840 (over 90 percent of these inhabitants were nationals of Tahiti).

[26] Sydney atoll is roughly circular in shape, enclosing a land-locked lagoon. It measures about 3¼ km from west to east and 2½ km from north to south.

[27] Caroline atoll measures about 10 km north and south by about 1 km wide. There are over 20 islets strung along the reef enclosing a shallow lagoon, which is closed against anything larger than a ship's boat. Some of the islets are 4½ to 6 metres high, and most are covered with coconut palms, pandanus and similar growth.

[28] Flint Island is situated in 11 deg. 25 min. S. lat. and 151 deg. 48 min. W. long. It is about 5 km long by one broad, flat and with a maximum height of about 7½ metres. It is well-wooded.

A vessel of the U.S. Exploring Expedition surveyed it in 1841.

[29] Malden Island lies about 386 km south of the equator in 155 deg. W. long. It is flat and triangular, on a reef measuring about 6½ km by eight and enclosing a large lagoon.

Stone-faced platforms, graves and marae found on Malden indicate that Polynesians lived there for several generations before it was discovered by Lord Byron of the HMS frigate *Blonde* (At the time the *Blonde* was in the service of the Kingdom of Hawaii), who came upon it in 1825, and named it for the frigate's surveying officer, Lt. Charles Malden. It was then uninhibited. K. P. Emory, of the Bishop Museum of Honolulu, estimated in 1924 that the population in pre-contact times must have reached from 100 to 200. The occupation of the island was known in tradition to the people of Manihiki atoll.

Secretary of Interior James Watt is the "federal land manager" of these marae (religious temples), under the terms of the "Archaeological Resources Protection Act" of 1979, 93 Stat. L. 721 et seq. The only people that I know who consider these marae as having "religious or cultural importance" are living on the Island of Ra'ivavae which lies about 155 km ESE of Tubuai (Austral Islands). Their oral history talks about their "arioi" (Religious societies) on Malden as the descendants of Gods. King Pomare II of Taihiti visited Ra'ivavae Island by the ship *Arab* in 1815 and the islands chiefs formally ceded the government to him. M. Rudolf Bambridge, B.P. 517, Papeete, Tahiti is the attorney of the Taihiti Royal Family (also a member) and should be contacted for the views of the Royal Family over the future status of Malden and Hull Islands.

In 1962 the U.S. Government used Malden for its H-Bomb tests.

[30] Starbuck atoll lies about 540 km south of the equator and 174 km SSW of Malden Island in 155 deg. W. long. It is barely 4½ metres high at its highest point, 10 km long and about 3 km wide. It is barren and treeless, with a shallow lagoon.

It was discovered in 1823 by Captain Obed Starbuck of the U.S. whaler *Hero*.

[31] Vostok atoll is a low, uninhabited, trangular coral island less than 2 km square. A central clump of puka trees, about 25 metres high, is its principal feature. At the southwest corner is a boat passage through the reef.

The Russian explorer Bellingshausen discovered it in 1820 and named it after his ship.

tant. It lies 190 miles south of the equator. It is placed strategically from the standpoint of airplane travel, for it is 1,630 nautical miles from Honolulu. Consequently, it is one of the most important bases in the Central Pacific area.

Canton was discovered independently by several American whalers. It is not known which one reached the atoll first, for each whaler gave it a different name. It became known prior to 1828, because the Secretary of the U.S. Navy published a list in 1828 showing the location of the atoll.

Canton (Mary's) was first occupied by the crew of the New Bedford whaler *Canton* on 4 March 1854. These thirty-two men were the first known occupants of the island and they were all citizens of the United States. Captain Andrew J. Wing (master of the *Canton*) during his stay at Canton took possession of that atoll for the United States.

In May 1854, Captain Wing informed the Spanish Governor at Tinian of his activities at Canton. He also informed the British authorities at Hong Kong in August 1854 of these same activities.[32]

In March 1872, Commander Richard W. Meade, U.S. Navy, of the U.S. *Narragansett* made the first survey of Canton atoll for the Hydrographic Office to the U.S. Navy's Bureau of Navigation.[33] Meade named the atoll Canton Island and its lagoon Wing's Lagoon in honor of these first occupants of the atoll for their service to the United States.

On 3 March 1938, President Franklin D. Roosevelt issued Executive Order 7828 which placed Canton atoll under the control and jurisdiction of the U.S. Secretary of the Interior. Based on that E.O., the U.S. Coast Guard Cutter *Roger B. Taney* landed an American party consisting of four "colonists" on Canton atoll at 9 a.m., 7 March 1938, to re-occupy the atoll for these United States which began on 4 March 1854.[34]

By an Official Exchange of Notes between His Majesty's Government in the United Kingdom and the United States Government regarding the Administration of islands of Canton and Enderbury (Washington, 6 April 1939, Treaty series No. 21, 1939. London, His Majesty's Stationary Office, 6 pp.), the atoll was placed under joint British and American control for fifty years and "thereafter until such time as it may be modified or terminated by mutual consent."

In 1940, Pan American established a station on the island and in July of that year the company's station manager was designated the Deparment of Interior's representative. With the outbreak of World War II, air service was discontinued, civilian residents were evacuated, and the United States armed forces occupied the island.

Soon after the war, the Civil Aeronautics Administration (now the Federal Aviation Administration) sent representatives to Canton, and in 1946, the senior CAA employee on the island was designated as field representative of the Department of the Interior.

In 1965, the National Aeronautics and Space Administration (NASA) became the dominant user of the island and was designated the administering agency by the Secretary of the Interior. NASA operated a satellite tracking station on the island and provided operations support for the Weather Bureau and the FAA. In June 1967, NASA announced its decision to withdraw.[35] By a Special Order of the AFSC[36] Commander effective 1 November 1970 the Canton Auxiliary

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[32] P. J. Searles, "Canton to Guam", *The Guam Recorder* (9 December 1938), p. 9.

[33] Commander Richard W. Meade was not aware of the reorganization plan of the Hydrographic Office, dated 21 January 1871. This plan created the title "Hydrographer to the Bureau of Navigation" for the officer in charge and deemed his duties. It divided the office into five sections, as follows: No. 1, department of archives; No. 2, charts department; No. 3, meteorological department; No. 4, drafting and engraving department; No. 5, instrument department, and a library.

Meade, in his notes, still made reference to the Depot of Charts and Instruments which became part of the Hydrographic Office on 1 August 1866, when Commander T. S. Fillebrown was detached from the Naval Observatory, where he had charge of the preparation of charts, etc., and was appointed Hydrographer of the newly created Hydrographic Office.

[34] In 1889, the H.M.S. *Egeria* went to the Phoenix Islands to make surveys for the British Government. During her stay, Commander Oldham, RN, Captain of the *Egeria*, placed Phoenix, Birnie, Sydney, and Hull atolls under so-called "British protection". At the same time he made a survey of Canton atoll (See: J. J. Lister "Notes on the birds of the Phoenix Islands", *Proceedings* [Zoological Society of London, 1891], p. 289–300), but would not place it under British protection because he knew it was owned by an American citizen. Captain Gibson, of the H.M.S. *Curacoa* went to Gardner atoll in 1892 and issued a proclamation purporting to "annex it for the British Government". At that so-called "annexation" ceremony, Captain Gibson, RN, also acknowledged that Canton atoll was owned by an American citizen. A foriori, both Captains Gibson and Oldham acknowledged that Canton atoll was United States territory.

[35] U.S. Department of the Interior, Office of the Secretary, *Territorial Areas Administered by the United States* INT–418 (GPO: Washington).

[36] Air Force Systems Command.

Airfield was created which included the islands of Canton, Enderbury, Hull, Birnie, Sydney, and Gardner. The Canton Auxiliary Airfield was placed under the control of SAMTEC[37] (ADSC) out of Vandenberg AFB, CA.

By annex 2 of FO 4701–74–C–0116 (P00063) a modified contract between SAMSO and Global Associates (a contractor of SAMTEC out of Vandenberg AFB), Global Associates became responsible for the Canton Auxiliary Airfield on 1 January 1979.

Early in 1979, at a meeting in Suva, Fiji, the United Kingdom informed the United States that the agreement on the Administration of the islands of Canton and Enderbury would be terminated effective 12 July 1979 (the date of the United Kingdom gave independence to the Gilbert Islands Colony). The State Department informed the British side that it could not terminate the agreement unilaterally, but in light of Kiribati independence the Department would declare that agreement obsolete at midnight, 11 July 1979.

It should be noted that the so-called "decision" of the Department of Defense of 19 March 1979, was not voluntary. Ieremia Tabai (President of Kiribati) announced in early 1979, "If the 'Russians' come (to the Gilberts) we would talk to them and not send them away." Ieremia informed that United States and British delegates that his Government would not permit a U.S. Air Force Base in Canton after independence (without the payment of rent). The State Department informed Mr. Walter Slocombe (Assistant Secretary of Defense) that the 1970 arrangement[37] with the United Kingdom would become obsolete upon independence of Kiribati and the Air Force would have to leave Phoenix Islands.

On or about 8 May 1979, Mr. Morena, Vice President of Contracts, Global Associates, was informed by Mr. E. R. Ewen, SAMSO (AFSC) of Vandenberg AFB that Global Associates must leave Canton Island by midnight 11 July 1979.

On 3 July 1979, Secretary of the Interior Cecil D. Andrus sent a letter to Secretary of Defense Harold Brown informing him of a meeting between Peter Tali Coleman[38] (Governor of American Samoa), Miss Margaret Ann Roche (Samoan Desk, Office of Territorial Affairs, Department of the Interior) and Walter Slocombe (Assistant Secretary of Defense). It was noted at that meeting that Governor Coleman would become the representative of the Secretary of the Interior and the Civil Administrator for Canton and Enderbury Islands based on the authority vested in the Secretary of the Interior by E.O. 7828. Secretary Andrus on 3 July 1979, also sent a letter to Governor Coleman that appointed him the civil administrator of Canton and Enderbury Is'ands, effective at midnight, 11 July 1979. This left Hull, Birnie, Sydney, and Gardner atolls (part of the Canton Auxiliary Airfield complex). Still within the jurisdiction, control and accountability of SAMTEC, Vandenberg AFB, CA.

On 13 September 1979 a Special Order (G–142) was issued by James L. Wyatt, Jr., Lt. Col., U.S.A.F. for the Commander of the AFSC. This order confirms the verbal orders of General Anton Slay of 22 June 1979, which purported the disposal of the Canton Auxiliary Airfield (PIN DATB), effective 12 July 1979 (based on some alleged authority in AFR 87–5). This order caused these remaining four atolls to become within the jurisdiction, control and accountability of Air Force Systems Command directly. Global Associates' contract was terminated on 30 September 1979.

Governor Coleman has appointed an American Samoan to live on Canton as field representative of the Department of the Interior.[39]

Christmas Island (largest coral atoll in the world, with an area of 2334 square miles—over 10 times the size of Manhattan Island in New York City) resembles a chop in shape. It stretches from NW to SE. The largest portion is in the NW and encloses a spacious lagoon. The interior of the land area is dotted with more than 100 lakes. It lies at about 1 deg. 59 min. N. lat. and 157 deg. 30 min. W. long.

Pre-contact Polynesian artifacts of different periods and a number of stone structures have been found on the island. The island was discovered in 1537 by Hernando de Grijalva's crew after they mutinied and killed him (Spanish discovery). But the island was named by Captain Cook on 25 December 1777.

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[37] The so-called "second agreement" of 1970 to pay the United Kingdom annually for ten years was not an international agreement in the legal sense (NOTE: R. Roger Ma ak, *International Agreements: An Analysis of Executive Regulations and Practices* (95th Congress, 1st Session, Washington: GPO, 1977).

[38] My family has been good friends with Peter Coleman's family since 1937, i.e., ever since my uncle gave William Coleman (Peter Coleman's older brother) a job with Associate Motors (459 South Beretania Street, Honolulu, Hawaii), 44 years ago.

[39] Governor Coleman has also given me written permission to visit Canton atoll.

It has been American-owned since 1825. The U.S. Government acquired sovereignty over Christmas in the following manner (and not in 1939 as the State Department wants people to believe):

> Captain John Stetson of New Haven, Connecticut, landed on Christmas Atoll from the American ship *Equator* on February 15, 1825. Finding it not occupied, he claimed the island for himself.
>
> By a quit-claim deed of assignment, dated May 11, 1857, John Stetson and his wife sold Christmas Atoll to Alfred G. Benson of Brooklyn, New York.
>
> On the same date, Alfred G. Benson empowered Capt. J. L. Pendleton, master of the ship *John Marshall*, of New York, to take possession of the island, which was accordingly done on the 20th of June, 1858, in the name of, and on behalf of, Benson and his associates, in full conformity with the Guano Island Act of August 16, 1856 (48 U.S.C. 1411–1419).
>
> By deed dated May 13, 1857, Alfred G. Benson granted George W. Benson of Brooklyn, all of his rights, title and interest therein.
>
> On November 24, 1859, George Benson deeded the United States Guano Co. of the city of New York all of his right, title and interest in said discoveries.
>
> On November 25, 1858 the above two Bensons and seven others organized the United States Guano Co. as a New York corporation, pursuant to and in conformity with the act of the Legislature of the state of New York passed on April 15, 1857, entitled: 'An act to authorize the formation of corporations for the purpose of mining, importing guano and other fertilizers.'
>
> The United States Guano Co. gave an approved bond in accordance with the requirements of the Guano Islands Act (48 U.S.C. 1411–1419), and U.S. Secretary of State Lewis Case issued a certificate to the company for Christmas Atoll on December 29, 1859.
>
> On July 20, 1872, U.S. Navy Cmdr. Richard W. Meade, of the USS *Narragansett*, formally annexed Christmas Atoll for the government of the United States of America.
>
> Great Britain tacitly admitted United States sovereignty to Christmas Atoll in correspondence with the United States State Department as early as 1872.
>
> Ever since the United States government formally annexed Christmas Atoll on July 20, 1872, it has been constantly publishing documents which have included Christmas Atoll as an island belonging to the United States.

Despite this and an American protest, Captain William Wiseman of the HMS *Caroline* went to Christmas in 1886 and issued a proclamation purporting to "annex it for the British Government".[40]

During World War II and the late 1950's the United States built and manned military bases on Christmas Atoll. In 1962 the U.S. used Christmas along with Malden for its H-Bomb test.

In 1890, the United States Supreme Court in the case of *Jones* v. *United States*, 137 U.S. 202, took the view that the United States acquired 13 of the 14 atolls (except Hull), covered by this inchoate treaty, under the Act of August 18, 1856 (11 State. L. 119), the so-called Guano Act, and that they were not within the lawful jurisdiction of any other government and under the sole jurisdiction of the United States.[41]

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[40] The British Government in the last quarter of the 19th century issued proclamations purporting to "annex" other U.S. territorial islands as well.

NOTE.—Johnston Island was annexed by the United States Government in 1858 and purportedly "annexed" by the HMS *Champion* in 1892.

Baker Island was annexed by the United States Government in 1857 and was listed as a British possession in *British Possessions in Oceania*, No. 144 (London: Foreign Office, 1920), p. 16.

Jarvis Island was annexed by the U.S.S. *St. Mary* for the United States in 1858 and was purportedly "annexed" on June 3, 1889 by the HMS *Cormorant*. Howland Island was annexed by the United States Government in 1857 and was listed as a British possession in *The British Admiralty Sailing Directions, Pacific Islands*, Vol. II, 4th Ed., 1909, p. 196.

Therefore, if one would take the State Department's hypothesis to its logical conclusion the rule of international law that "the first assertion of sovereignty must not be an usurpation of another's subsisting occupation nor contested from the first by competing acts of sovereignty." (State Department's own official "Digest of International Law"), does not apply to the United Kingdom when they assert sovereignty. It also follows that if the U.S. Claim is "weak" to Christmas and the other atolls covered by this inchoate treaty, then the above four atolls are not safe from the I–Kiribati or British officialdom.

[41] Source: Circular No. 1 "Relative to the Guano Islands Appertaining to the United States" of Synoptical Series 1869, issued 12 February 1869 by Hugh McCulloch, U.S. Secretary of the Treasury.

Footnote 41 continued.

TREATY WITH THE COOK ISLANDS ON FRIENDSHIP AND DELIMITATON OF THE MARITIME BOUNDARY, EXECUTIVE P (96TH CONGRESS, 2D SESSION)

This inchoate treaty, as presently written, would cede to the Cook Islands Government five atolls under actual U.S. Government, five atolls under actual U.S. Sovereignty since the mid 1800's, i.e., Manihiki, Nassau,[42] Penrhyn, Pukapuka (Danger) and Rakahanga, and a large portion of the fishery conservation zone of American Samoa.[43]

It appears that former acting Secretary of State Warren Christopher was not properly briefed on the history of these U.S. Sovereign South Pacific atolls, when he obfuscated their historic connection with the rest of the United States in his following statements:

> In connection with establishing the maritime boundary it was necessary to address and resolve the issue of the sovereignty over the islands of Pukapuka (Danger), Manihiki, Rakahanga, and Penrhyn. The U.S. claims to these particular islands arises out of occasional 19th century visits to the islands by American whalers, and by execution of guano bonds under the Guano Islands Act of 1856. The U.S. claim has virtually no legal merit and is not supported by any other nation. The United States has never exercised government jurisdiction over these islands.
>
> These islands and these people have historically been an integral part of the Cook Islands. Continued assertion of these claims is inconsistent with the U.S. interest of maintaining friendly relation with the people of the South Pacific.

These statements by former Acting Secretary of State Christopher were not correct and needs clarification. The following facts will correct the errors in fact and conclusions of law stated by Christopher in the aforesaid "Letter of Submittal."[44]

The Cook Islands did not exist as a political entity until 11 June 1901. Thus it is not appropriate to write that "(t)hese islands and people have historically been part of the Cook Islands."

Geographically these five atolls are part of the Humphrey Group. The group got its name from Captain Patrickson of the American whaler *Good Hope* in 1822, who named the archipelago Humphrey's.

Manihiki (Humphrey's) is a most beautiful coral atoll, with many inlets or motu, strung around the reef which fringes the lagoon. The total land area is about 140 hectares. Nassau is a coral outcrop of about 225 hectares, which has no lagoon, and is about 45 kilometres southeast of Pukapuka. Pukapuka (also known as Danger or Dangerous Islands) atoll, which has a surface area of about 45 hectares, lies about 1150 kilometres northwest of Rarotonga, and consist of three islets, each of which form the corners of the triangular-shaped lagoon. Rakahanga (Riersons) atoll has a land surface of 1085 hectares and lies about 1120 kilometres northwest of Rarotonga, and is unusual in that its shallow lagoon is almost land-locked. Penrhyn or Penchuyno (Tongareva) atoll encloses a lagoon of 280 square kilometres, making it one of the largest of all the lagoons in the Pacific, has a land area of 600 hectares, and lies 1170 kilometres northeast of Rarotonga.

Footnote 41—Continued

Present name	Location	Former name as bonded
Birnie Atoll	Phoenix Islands	Bernie's.
Gardner Atoll	do	Gardner's.
McKean Atoll	do	McKean.
Phoenix Atoll	do	Phoenix.
Sydney Atoll	do	Sidney's Islands.
Canton Atoll	do	Mary's.
Enderbury Atoll	do	Enderbury.
Christmas Atoll	Line Islands	Christmas.
Caroline Atoll	do	Caroline.
Malden Island	do	Malden's.
Starbuck Island	do	Starbuck or Hero.
Flint Atoll	do	Flint.
Vostok Island	do	Staver's.

[42] Not stated in Article V of Executive P (96th Congress, 2d Session), but can be inferred by the maritime boundary coordinates stated in Article I.

[43] Created by Congress, pursuant to the Fishery Conservation and Management Act of 1976.

[44] Warren Christopher, Acting Secretary of State, "Letter of Submittal," *Treaty With the Cook Islands on Friendship and Delimitation of the Maritime Boundary*, Executive P (96th Congress, 2d Session), p. V.

The people of these atolls are of Polynesian origin closely related to the Manuans of American Samoa. The pre-1860's Polynesian inhabitants were mostly kidnapped by Peruvian slavers in the years 1862–63. Very few of them ever returned to these islands, because most of them died as slaves in Peru. The present population came mostly from other island groups after the 1860's. Many now have some American blood, derived from the traders and beachcombers who settled in these atolls during the nineteenth century. The Manuan connection is quite clear in light of the marked dialectic differences between the Maori language spoken in Lower Cook Group (Rarotongan) and the lingua franca spoken on Pukapuka and Nassau atolls (Manuan).

Pukapuka was the first of these atolls which became known to the western world. It was sighted by Alvaro de Mendana during his second voyage from Tahuata to Ndeni on 20 August 1595.[45] There are two major accounts of Mendana's discovery of "San Bernardo" (Pukapuka) atoll: a long narrative dictated by Petro Fernandez de Quiros to his secretary, Belmonte Bermudez, and a shorter report written by Quiros to the Governor-General of the Philippines.[46]

The first European to reach Rukahanga was the Spaniard Petro Fernandez de Quiros[47] on 2 March 1606. There are seven known published accounts of Quiros discovering Rakahanga: the aforementioned narrative of Quiros himself, as dictated to Belmonte Bermudez; the journal of the pilot Gaspar Gonzalez de Leza; the narrative of the Franciscan provincial Juan de Torquemada; the journal of Fray Martin de Munilla, commissary of the Franciscans; the sumario breve of Juan de Iturbe, accountant and overseer; the relacion sumaria of Don Diego de Prado y Tovar; and a letter from Luis Vaez de Torres[48] to the King of Spain.[49] It was Torquemada that called Rakahanga atoll the island Gente Hermosa (the handsome people) because he was taken with the appearance of the Rakahangans.

Nassau was first sighted by Captain Luis Coutance,[50] in the ship *Adele* owned by Merle Cabot and company.[51] . . . Therefore, Nassau atoll was a French discovery. Manihiki was discovered on 13 October 1822, by the American whaling Captain Patrickson, on the ship *Good Hope*. It is not known precisely when or by whom Penrhyn was discovered. Captain William Sever named the atoll Penrhyn's Island after his ship *Lady Penrhyn* on 8 August 1788, even though the atoll was very well known.[52]

Between 1822 and 1870 the Humphrey Archipelago were frequently visited by American whalers. Seamen from these American ships occasionally deserted and became beachcombers and traders or agents for firms in the United States.[53]

Nassau atoll has a historic American connection similar to the other 4 atolls. Because of space considerations in this statement, I will limit my discussion to Nassau atoll as an example of the American claims to the entire group covered by this inchoate treaty.

The American trader John Ellacott acquired Nassau atoll about 1873. He exploited the island for copra and its guano deposits. Ellacott recorded his title to Nassau atoll with the United States Consular Court at Papeete, Tahiti.[54] Ellacott sold Nassau to the American trader Harry Jay Moors[55] in 1892. Moors re-

[45] Sir Clements Markham, *The Voyages of Pedro Fernandez de Quiros*, 1595–1606. 2 vols. Hakluyt Society, Series II, Nos. 14–15. London: The Hakluyt Society, 1904, pp. 30–31.

[46] Markham, I: pp. xi–xiii.

[47] Quiros was the Chief Pilot on the second voyage of Mendana: 1595.

[48] The Torres Strait were named after him.

[49] For the accounts of Leza, Quiros, and Torquemado, see Markham, 1904; Prado's relacion and a translation of Torres' letter are given in Henry N. Stevens and George F. Barwick, *New Light on the Discovery of Australia as Revealed by the Journal of Captain Don Diego de Prado y Tovar*, Hakluyt Society, Series II, No. 64 (London: The Hakluyt Society, 1930); and the journal of Munilla and Iturbe's sumaria in Celsus Kelly, ed., *La Australia del Espiritu Santo—The Journal of Fray Martin de Munillo O.F.M. and other documents relating to the Voyage of Pedro Fernandez de Quiros to the South Sea (1605–1606)* and the Franciscan Missionary Plan (1617–1627), 2 vols. Hakluyt Society, Series II, Vols. CXXVI–CXXVII. (London: The Hakuyt Society, 1966).

[50] Louis Ruault Coutance, "extrait du Brick . . . l'Adele, . . . au Port Jackson sous le commandement de Louis Ruault Coutance, 13 praisial XI–10 frustidor an XII". (Copies of Miscellaneous MSS in Service Hydrographique de la Marine, Vol. 102, MS B 1190), (Sydney: Mitchell Library, 1803–1804).

[51] Merle, Cabot and Company was a French firm on the Ile de France (former name for Mauritius). At the time of Coutance's discovery of Nassau atoll, Mauritius was part of France.

[52] Arthur Phillip, *The Voyage of Governor Phillip to Botany Bay . . . to which are added the Journal Lieuto. Shorthand, Watts, Ball, & Capt. Marshall, with an Account of their New Discoveries*, (London: John Stockdale, 1789), p. 244.

[53] Edouard A. Stackpole, *The Sea-Hunters* (Philadelphia: J. B. Lippencott, 1953).

[54] William Wyatt Gill, *Jottingo from the Pacific* (London: The Religious Tract Society, 1885).

[55] See footnote No. 13 for the background of H. J. Moors.

corded his title to Nassau atoll with the United States Consular Court at Apia, Samoa.[56] Moors sold his ⅔ interest in Nassau atoll to Messrs. Rye and Stunzer; it later passed from them to Burns, Philp and Co. In 1945 the New Zealand Government purchased Burns, Philp and Co. rights to Nassau. Therefore ⅓ interest in Nassau atoll is presently owned by American citizens.

The present Cook Island Government does not recognize the ⅓ interest of these United States citizens in Nassau atoll. If the treaty takes force a few U.S. citizens shall suffer diminution of their rights and privileges to the ⅓ interest in real property on Nassau atoll.

During World War II the United States built and manned naval and air bases on Penrhyn atoll. In the post-war years the air-strip on Penrhyn was re-activated in connection with the American nuclear testing programmes.

In 1890, the United States Supreme Court in the case of *Jones* vs. *United States*, 137 U.S. 202, took the view that the United States acquired the five aforementioned atolls covered by this inchoate treaty, under the Act of August 18, 1856 (11 Stat. L. 119), the so-called Guano Act, and that they were not within the lawful jurisdiction of any other government and under the sole jurisdiction of the United States.[57] Therefore Acting Secretary of State Christopher errored when he stated: "The U.S. claim has virtually no legal merit" . . . and "has never exercised government jurisdiction over these islands."

Christopher also stated in his submittal letter that the United States sovereignty over these atolls "is not supported by any other nation." Christopher thereby inferred that United States sovereignty over its claimed territory is not valid unless it is supported by another nation. He used the old lawyers technique of inclusio unius est exclusio alterius, which is to say, "you drew attention to that which you did not name by the act of naming anything at all." Mr. Christopher's views show that American sovereignty in order to be valid must be supported by other nations is abhorrent to the Society for the Protection of American Sovereignty.

In 1912 Italy obtained the express recognition by a number of States of her annexation of Tripoli and Cyrenaica. In September 1912, she approached the United States with a request for recognition, the United States Government replied that it was not its custom "to proceed in that manner, especially with regard to European affairs; that when the United States took over the Philippine Islands and Puerto Rico, foreign governments were not asked for their acquiescence nor for their recognition and none was given."[58] A fortiori, if the United States Government does not require acquiescence or recognition of its claim to Puerto Rico, then it does not require the support of other nations to make the United States claim of sovereignty to the Guano Islands as valid.

Mr. Christopher said that "(c)ontinued assertion of these claims is inconsistent with the U.S. interest of maintaining friendly relations with the peoples of the South Pacific." The State Department claims that good will may be gained in the entire South Pacific by abandoning these five atolls to the Government of the Cook Islands. What this is actually accomplishing is world-wide ridicule and an

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[56] The United States Consular Court was closed at Papeete, Tahiti in 1880, after Pomare V, was persuaded to abdicate and to declare Tahiti, and its dependances "united to France". The U.S. Consular Courts of Papeete and Apia in recording Ellacott's and Moors' titles to Nassau and Niulakita atolls were acting in these recordings as Courts of Record of the United States.

[57] Source: Circular No. 1 "Relative to the Guano Islands Appertaining to the United States" of Synoptical Series 1869, issued 12 February 1869 by Hugh McCulloch, U.S. Secretary of the Treasury.

Present name	Former name as bonded	Date of bond
Maruhiki	Humphreys	Feb. 8, 1860.
Nassau	Nassau	Do.
Penrhyn	Penhmyno	Do.
Pukapuka	Dangerous Islands	Do.
Rakahanga	Riersons	Do.

NOTE.—The above 5 atolls were all covered by bond No. 9.

[58] *Foreign Relations of the United States*, 1913, p. 609.

unstable South Pacific, comparable to that of the United States experienced from the Wrangell Island debacle.[59]

The Soviet Navy has been very active in the Cook Islands for the last few years. Teams of Soviet Russian "scientists" have been stationed on Suwarrow Atoll,[60] with the permission of the Cook Islands Government, to investigate the feasibility of using the atoll as a Soviet "fishing" base.[61] If this inchoate treaty goes into force the Cook Islands Government could turn over to the Soviets the United States military base on Penrhyn, i.e., together with Suwarrow, Penrhyn is the only coral atoll in the territories claimed by the Cook Islands Government where large vessels are able to enter the lagoon. The main reason the ship *Kallisto* did not take its Soviets "scientists" to Penrhyn to investigate "peculiarities of the coral formation within" its lagoon, as it did on Suwarow in 1976–1977, was that the United States claimed sovereignty over Penrhyn and the Soviets did not want to risk a confrontation since they had access to Suwarrow anyway.

Unlike the aforementioned inchoate treaties with Tuvalu and Kiribati (Hawaii's nearest foreign neighbors) the Cook Island Government would not agree to an article in this treaty to consult with the United States regarding any proposed use of the ceded atolls for military purposes by third parties.[62]

The Soviet Navy also left a team on Pukapuka in 1977 to investigate the atoll for nefarious purposes unknown to myself.[63] The Cook Islands Government gave permission to the Soviets for said visit. I informed the State Department about the then proposed visit of the *Kallisto* to the Guano Islands of the United States in late 1976, i.e., I remember telling K. Scott Gudgeon of the State Department's Legal Adviser Office of the voyage of the Soviet "research" (spy) ship *Kallisto* prior to the ship leaving the U.S.S.R. on said voyage.[64]

Mr. Christopher raised one other point in his "Letter of Submittal" that needs clarification. He stated that the "Cook Islands is in free association with New Zealand" and "may unilaterally declare its independence from New Zealand at any time." If the Cook Islands declared independence from New Zealand they would no longer be under the ANZUS umbrella and could be the first South Pacific government to fall in the Soviet camp if Kiribati does not get there first.[65]

TREATY WITH NEW ZEALAND ON THE DELIMITATION OF THE MARITIME BOUNDARY BETWEEN THE UNITED STATES OF AMERICA AND TOKELAU, TREATY DOC. NO. 97–5

This inchoate treaty, as presently written, would cede to the Government of New Zealand three atolls under actual U.S. Sovereignty since the mid 1800's, i.e., islands of Atafu, Nukunono, and Fakaofo.

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[59] Mark Seidenberg, "Wrangell Island: Chronology of a Polar Panama", *Trunk Line* (Los Angeles: Republican Central Committee of the Los Angeles, County), January 1978, Vol. XI, No. 5, pp. 9 and 11. David M. Nolan and Mark A. Seidenberg, "The Right of American Sovereignty over Wrangell Island: The Most Burning International Legal Issue of the Arctic" (Is to be published in *The Musk-Ox:* a journal on the north), (Saskatoon: Institute for Northern Studies, University of Saskatchewan), Winter 1982, No. 31.

[60] Lieutenant Mikhail Lazarev, of the Russian vessel *Suvaroc* discovered this uninhabited coral atoll, now known as Suwarrow, on 28 September 1814. Suwarrow is the only coral atoll in the Cook Islands where quite large vessels are able to enter the lagoon. The lagoon with some dredging could accommodate a large Soviet naval fleet.

[61] A. G. Voronov, G. I. Ignatyev, and P. A. Kaplin, Reyc (Kallisto) Na ostrova Tukhogo Okeana (a trip of the (Kallisto) to some islands of the Pacific), *Vestnik*, (Moscow: Moscow Universitet), Serica V, Geografica, 1977, No. 5, pp. 111 to 118. It should be noted that "officially" the Cook Island Government gave the U.S.S.R. permission to investigate "peculiarities of coral formation within the Suwarrow lagoon."

[62] It should be noted that the Tuvalu treaty gave this right to the United States for only six months and the Kiribati treaty was for only ten years.

[63] From the Soviet spy ship *Kallisto*. It should be noted that Pukapuka is very close to the U.S. Naval base at Pago Pago, American Samoa.

[64] Mr. Gudgeon at the time acted very curt and indifferent about this Soviet spy ship going to the islands of American Polynesia. To be fair to Mr. Gudgeon, I told him at that time the ships name was *Kalypso*.

[65] It is well known of the connection between the Cook Islands Party (CIP) and the New Zealand Communist Party (NZCP). CIP leaders were trained by the NZCP. The NZCP is a Moscow orientated movement that favors the end of the ANZUS treaty. It acted as the conduit for the Soviet Union in getting permission to "visit" Suwarrow and Pukapuka, from Sir Albert Royale Henry K.B.E. (former Premier of the Cook Islands) in 1976. Sir Henry was trained by the NZCP. See: Thomas R. A. Davis, "The Democratic Party" in *Cooks Islands Politics*, ed. Ron Crocombe (Auckland: Polynesian Press, 1979) p. 64.

Ieremia Tabai (President of Kiribati) announced in 1979 just prior to its independence from Great Britain, "If the 'Russian' come (to the Gilberts), we would talk to them and not send them away."

It appears that Secretary of State Alexander M. Haig, Jr., was not properly briefed on the history of these United States sovereign South Pacific atolls, when he obfuscated their historic connection with the rest of the United States in his following statements:

> The Treaty establishes the maritime boundary between American Samoa and Tokelau, resolves the status of three Tokelauan islands in the area, and confirms United States sovereignty over Swains Island.
>
> In connection with establishing the maritime boundary it was necessary to address and resolve the issue of sovereignty over the islands of Atafu, Nukunono, and Fakaofo which together comprise Tokelau. These atolls have a total population of 166 (sic) people and a land area of four square miles.
>
> It was not until 1939 that the United States disputed the British or New Zealand claims of sovereignty. The United States based its claim to the island on mapping and on the Guano Act of 1856. Two of the islands were included in a United States Guano Mining Bond in 1856 but there is no indication that an American company has ever mined the islands for guano. The United States has never occupied these islands or exercised governmental jurisdiction over them. Measured against the longstanding United Kingdom/New Zealand claim, the United States claim to these islands has no substantial basis under applicable principles of international law. Our claim is not supported by any other nation, including our closest allies. Continued assertion of these claims is inconsistent with the United States interest of maintaining relations with the peoples of the South Pacific. The islands have no appreciable strategic or economic value to the United States.
>
> Delimitation of (sic) the (sic) maritime boundary also involves the issue of sovereignty over Swains (sic) Island in American Samoa. Swains, a privately owned island, was annexed to American Samoa in 1925. The Tokelauans have claimed that Swains Island is historically and culturally part of Tokelau, and they have so informed the United Nations. This Treaty effectively extinguishes the Tokelauan claim and confirms United States sovereignty over Swains.
>
> The Treaty was negotiated through diplomatic channels and was concluded between the United States and New Zealand, rather than Tokelau, because Tokelau is a non-self-governing dependancy of New Zealand.[66]

These statements by Secretary of State Haig were not correct and needs clarification. The following facts will correct the errors stated by Haig in the aforementioned "Letter of Submittal."

The Tokelau group lie approximately 300 miles north of Western Samoa. It consists of Atafu, Fakaofu, Olosenga, and Nakunono atolls. The group was politically dominated by the Fakaofu kings until the last half of the 19th century, because of that atoll's possession of "Tui Tokelau" (stone god to which the whole group owed allegiance until 1918).

The three northernmost atolls each consists of a number of reefbound islets encircling a lagoon. These islands, also known as motu, vary in size from 100 metres to six and half kilometres long. The largest atoll is Nukunonu of 540 hectares; Fakaofo and Atafu having 260 and 200 hectares respectively.

From Atafu in the north to Fakaofo in the south, these three northern atolls of the group extends just under 200 kilometres.

The atolls are three to five metres above sea level.

Olosenga (Swain's Island), which lies about 320 km. north of Samoa is an atoll about 2½ km. long by 1¾ km. wide. The greatest elevation of land is about 6 m.

Fakaofo atoll was the first Island of the Tokelau Islands to be populated and the original settlement date was "about the middle of the seventeenth century."[67] The last atoll of the group was not populated until the early 1840's, i.e., Olosenga.[68]

The atolls of Atafu, Fakaofu, and Nukunono were first visited by Captain Smith of the whaler *General Jackson* of Bristol, Rhode Island in February 1835.[69]

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[66] Alexander M. Haig, Jr., Secretary of State, "Letter of Submittal", *Treaty with New Zealand on the Delimitation of the Maritime Boundary Between the United States of America and Tokelau*, Treaty Doc. No. 97–5, pp. V–VI.

[67] Gordon MacGregor, *Ethnology of Tokelau Islands*, (Honolulu: Bernice P. Bishop Museum, 1937), Bulletin 146, p. 17.

[68] Lt. L. Hudson of the United States Exploring Expedition in 1841 established priority for the United States to Olosenga, since his occupation from this congressionally authorized voyage of discovery predates the forming of a colony on the atoll (by islanders from Fakaofu). Hudson named the atoll Swains after a whaling captain called Swain.

[69] Yankee (pseudonym), "D'Wolf Island", *Bristol Gazette and Family Companion*, Vol. III, No. 11 (year 1835).

Therefore, the first contact the entire populated group had with the outside world was with the crew of an American ship. Captain Smith gave the name "D'Wolf Island" to Fakoafu atoll in honor of the owner of the *General Jackson* on 14 February 1835.

According to R. Gerald Ward, the ship *General Jackson* "was chased by about 30 canoes" a few miles from Fakaofu atoll.[70]

However, according to Stephen Crocker: The *General Jackson* made the first landing by white men at Fakaofu atoll "and found the natives friendly" to his crew. This landing took place in 1839 and was the first time a king of Tokelau had contact with the outside world.[71]

The first detailed knowledge of the Tokelaus was obtained when the U.S.S. *Peacock* and *Flying Fish* of the United States Exploring Expedition spent several days among them in 1841. According to Horatio Hale (the expedition's ethnologist and linguist): "The village islet at Fakaofu was covered with coconut trees, under the shade of which the houses were scattered, a few yards from one another. They were very numerous, the village being quite a large one . . ."[72] During this occupation by the U.S. Exploring Expedition of the Tokelau Islands, the United States made its first sovereign claim to these islands, i.e., in juxtaposition to the 1840 claim of the United States to Hull atoll.

In 1856, Eli Jennings, an American with his Samoan wife claimed title to Olosenga. The Jennings took over the plantation and its Tokelauan laborers. The atoll has remained in the Jennings family ever since, producing up to 200 tons of copra a year.

In 1863, Benjamin Hughes, an American, with his wife and child claimed title to Fenuafala Islet of Fakaofu atoll.[73] In June 1865, Benjamin Hughes filed a complaint against Litoa (King of the Tokelau Islands) in the United States Consular Court at Apia, Samoa. Hughes alleged in said complaint that the "alika".[74] Litoa committed among other things Cocoa nuiferacide on Fenuafala Islet. Both Hughes and Litoa were residents of Fakaofu atoll. Fukaofu atoll was included on Guano Bond No. 9, dated 8 February 1860 by its variant name Low Islands.[75] The United States Consular Court at Apia, Samoa assumed jurisdiction in this case on the grounds that the sovereignty and jurisdiction of the United States was extended to Fakaofu atoll on 8 February 1860, by the Guano Island Act. The United States Commercial Agent for Apia heard this case in his capacity as a "court of record of the United States" and aside from his extraterritorial status.[76]

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[70] R. Gerald Ward, *American Activities in the Central Pacific*, Vol. II, p. 304 (Reprint of report in *New Bedford Mercury*, 23 October 1835).

[71] Stephen R. Crocker, MS. nd., *Journal of the "General Jackson" 1836–9*, Nicholson Collection, Providence Public Library (note entry for 29 January 1841).

[72] Horatio Hale, *United States Exploring Expedition . . . Ethnography and Philology* (Philadelphia: Lee and Blanchard, 1846), p. 157.

[73] Benjamin Hughes came to Fakaofu atoll with his family from Penrhyn atoll (where he lived for many years).

[74] Alika is Tokelarean for lord, i.e., despotic ruler of these islands. See: Hosea Kirifi and J. H. Webster, *Tokelau-English Dictionary*.

[75] It should be noted that only two bonds were issued under the Guano Act of 1856. Bond number one covered Bakers atoll (Phoenix Islands) dated: 28 October 1856, and bond number two which covered Jarvis atoll (Line Islands) was issued on the same date. All of the Tokelau Islands were included under its variant names under Bond No. 9, Bond No. 9 was issued on 8 February 1860.

Present name:	*Name on Bond No. 9*
Atafu	Duke of York.
Fakaofu	Low.
Nukunono	Clarence.
Olosenga (Swain)	Quiros.

[76] *Hughes* vs. *King of Bowditch*, United States Consular Dispatches-Apia, U.S. National Archives Publication T–27 (5 June 1865).

In the case of *United States* vs. *Thompson*, 1 Extraterr. Cas. 261 (1912) and *United States* vs. *Willis B. Kilgore*, 1 Extraterr. Cas. 395, 403–404 (1914), the United States Court for China (one of the United States Consular Courts) found that its jurisdiction was not necessarily confined to the territorial boundaries of China and that in certain cases it sits in its capacity as a "Court of the United States" and aside from its extraterritorial status. The United States Court for China in the case of *United States* vs. *William Dommer*, 1 Extraterr. Cas. 914, 915 (1919) held that it had jurisdiction "over offences committed on an American ship 'on the high seas', citing *U.S.* vs. *Kilgore* and *In re Ross*, 140 U.S. 453 (1891):

> ". . . this court's power to take cognizance of crimes committed outside of Chinese territory may arise not only from the Acts of Congress passed since the establishment which according to a well settled doctrine came into force as to this court upon its organization." *United States* vs. *Willis B. Kilgore*, 1 Extraterr. Cas. 395, 404 (1914).

In the late 1870's an American trader of Portuguese decent ("potuki Amelika" in Tokelauan) had children by many women in each of the atolls.[77] His children's descendants can be located in the current genealogies on all Tokealau atolls, and the genetic implication of his sojourn shows that United States citizens have been living on all of the atolls continuously since the 1870's.

In 1889 the commander of the HMS *Egeria* declared the Union Islands (variant name for the Tokelau Atolls, meaning the American Union of States) protectorates of the United Kingdom in order to establish British claims to these islands in case they should prove of use as staging points for a trans-Pacific cable which had been proposed at the Colonial Conference in 1887. The most likely cable bases were held to lie in the Phoenix group, and the Tokelau Protectorates were declared (en passant) in the course of a voyage to the Phoenix Island.[78] The United Kingdom did not claim sovereignty to the Tokelau Island by the voyage of the HMS *Egeria*.[79] The Nukunono Islanders made the strongest objections to said protectorate on the grounds that the portion of the islands' population which "embraced Christianity" were Roman Catholic, because of the Marist missionaries telling their flock that the British were Protestants. No British residents were established in the atolls after the declaration of the Protectorates because of the strong loyalty the Tokelau Islanders had to the Marist missionaries and the American traders sojourning in the Tokelau Islands.

In 1889 the closest U.S. and British Officials were in Apia, Samoa to the Tokelau Islands. The reason that Britain had the chutzpah to make a protectorate over islands that were under American sovereignty since 1860 was that in 1885 the British and Germans entered into a secret treaty to drive American traders out of Oceanica by dividing the Pacific into spheres of influence between British and German interest. The United States Government protected its rights at that time.[80]

The Samoan Islands were divided, however, by a treaty between the United States, Great Britain, and Germany, on December 2, 1899 under which the rights and claims of Great Britain were renounced as to the entire group of islands and the rights and claims of the United States and Germany restricted to separate groups of the islands. Upolu Island was renounced in favor of Germany by the United States[81] and the treaty entered into force on 16 February 1900.[82]

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[77] Pamela D. Raspe, "Analysis of the Breeding Structure of a Polynesian Isolate" (M.A. thesis, University of Auckland, 1972).

[78] W. P. Morrell, *British in the Pacific Islands* (Oxford: Clarendon Press, 1960).

[79] It should be noted that sovereignty does not derive from a protectorate in international law. See: *R. vs. Crowe, ex parte Sekgome* (1910), 2 King's Bench Reports 576 at p. 620. Therefore, the U.K. can not claim the Tokelau atolls based on the acts of the HMS *Egeria* in 1889. Britain declared the United States territory of Alaska a British Protectorate in 1879 (12 years after the U.S. acquired Alaska from Russia). Said protectorate was declared by Commander H. Holmes a' Court, of the HMS *Osprey* as he entered Sitka (Sitka: Sitka Printing Company 1968) p. 31: ". . . the British gunboat *Osprey* steaming into the harbor with its guns trained on the native village."

[80] It should be noted that the 1887 Colonial Conference directed that islands taken for the trans-Pacific cable could only be held as long as the Anglo-German treaty of 1885 was still in force. In 1892, the U.S. Secretary of State wrote the British Government of the United States paramount claim to these islands. He wrote: "The germs of civilization were planted in the group by the zealous endeavor of American citizens more than half a century ago. The result of this work, carried on by American citizens and money, has been, in fact, to change the naked barbarism of the island natives into enlightened communities and to lay the foundations of the trade and commerce which have given these islands importance in the eyes of Europe today. Dr. George H. Blakeslee, "The Islands of the Pacific Ocean" (Paper delivered to The Conference on the Limitation of Armament, Washington, D.C., April 14, 1922) p. 16.

[81] In return for British withdrawal from Samoa, Germany surrendered all her rights in the Tonga Islands, and all the Solomon Islands east and southeast of Bougainville. Hertslet's *Commercial Treaties*, Vol. 21, 1901, p. 1178.

To complete British control over the Tonga Islands, Great Britain asked the United States also to renounce in her favor all American rights in the Archipelago and to agree to the abrogation of the United States-Tonga Treaty of 2 October 1886. This treaty granted to the United States most favored nation guarantees and the rigat of establishing a naval coaling and repair station. Malloy, Treaties, II, p. 1781.

Ambassador Baron Julian Paucefote of Great Britain, in a letter (27 November 1899) to U.S. Secretary of State Hay, commented as follows upon the grant to the United States of the privilege to establish a coaling station:

> "Those articles are of course incompatible with the intention in the settlement of the Samoan difficulty that the Tonga Islands should pass to Great Britain in as full sovereignty and possession as Upolu and Savaii are to pass to Germany and Tutuila to the United States."

Secretary of State Hay, by letter to Ambassador Paucefote (dated 29 November 1899) declined the suggestion of the British Government, alleging that:

> "In the preliminary conversation which preceded the drafting of the tripartite convention now under discussion, there never has been any suggestion of the renunciation by the United States of any rights they might have outside the Samoan group of Islands."

[82] Treaty for the Adjustment of Jurisdiction in Samoa of 2 December 1899 (entered into force 16 February 1900). 31 Stat. L. 1878 et seq.

This treaty caused the Anglo-German treaty of 1885 to become obsolete. A fortiori, the Protectorate decrees of 1889 over the Tokelaus should also be obsolete in light of the determinations made at the Colonial Conference in 1887. The German authorities at Apia would not let the British claim administration of the Tokelaus from Apia any more. Because of the action by the German authorities at Apia, Britain moved its administrative center for Tokelaus to Tonga. The United States-Tonga Treaty of 2 October 1886 became a road block in Britain administrating the Tokelaus from Tonga. The Privy Council of Tonga ordered the British Deputy-Commissioner to end its claim into jurisdiction over the Tokelaus from Tonga territory. The High-Commissioner in 1908 shifted the administration center for the Tokelaus to Banaba Island, since Banaba was a British Colony and the British administered the so-called "Gilbert and Ellice Islands Protectorates" from there.

Shortly before 1910, the British Commissioner of the Gilbert Islands collected tax from Mr. Jennings on his visit to Olosenga, amounting to some $80.00. Upon Jennings protest that the island was American and not British, the tax was later remitted, and the British Assistant High Commissioner for the Western Pacific informed the American Consul at Apia, 10 November 1910, that the British Government recognized Olosenga as an American possession.[83]

On 29 August 1914, a New Zealand military force, led by Colonel Robert Logan, seized and occupied Western Samoa. New Zealand's military occupation continued under Colonel Logan, C.B. until 30 April 1920.[84]

By the Treaty of Versailles, a "C" Class mandate for the future government of Western Samoa was offered to and accepted by New Zealand. It continued from 1920 until 1946.

In 1925 the New Zealand authorities in Apia began to claim control over the Tokelau Island. This activity by the New Zealand authorities caused on 4 March 1925, President Calvin Coolidge to duly adopt and approve a joint resolution (43 Stat. 1357; 48 U.S.C. 1431) that extended to Olosenga atoll the Government of American Samoa.

According to May, 1925, issue of *Ole Foatonu* (No. 5, vol. XXIII) published by the Government of American Samoa at Pago Pago, which reads as follows:

> "The (U.S.S.) *Ontario* arrived at Swains (Olosenga) Island the morning of May 13, 1925, and the official party immediately went ashore. At 3:00 p.m., the official ceremonials began. Lieutenant Commander Edgar, U.S. Navy, representing the Government of American Samoa read his orders from the Governor of American Samoa . . . proclaimed sovereignty of the United States over the Island. The American flag was then hoisted and the *Ontario* fired the National Salute of twenty-one guns.
>
> "After the hoisting of the flag, a Samoan Pastor led the assembly in the Samoan Hymn, after which he made an appropriate speech telling the people of the island that heretofore they had no father and no mother and never know where they stood but that now the great American Government would take care of them, and they would have a father and mother."

The New Zealand Administration was hated by large groups of Samoans and Tokelauans during this period. The breaking point came on "Black Saturday," 28 December 1929. The Mau (opinion movement) staged a demonstration to welcome A. G. Smyth home after his exile, and A. Hall-Skelton who accompanied him.[85] Col. Sir Stephen S. Allen had ordered that at least one "wanted" man was to be arrested in the event of another parade, and the inspector of police sent the Mau a warning of his intention to arrest any men participating for whom warrants had been issued, though Mau leaders later denied having received it. The arresting party consisted of a sergeant and six constables, carrying revolvers. A supporting party of twenty men with rifles and a Lewis gun was in readiness. An attempt was made to arrest Mata'utia Karauna, the Mau secretary who was wanted on the charge of assault. As a result of the clash which followed, in which about 300 took part, Tupua Tamases Lealofi III, ten other Samoans and one European constable were killed, and some thirty Samoans and Tokelauans wounded.

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[83] Consul at Apia to Department, 26 November 1910. File No. 811.0141Q/5. Also, to the same effect, communication from the British Government, 30 January 1918; Consul at Apia to Department of State, 26 November 1920. File No. 130J499.

[84] S. J. Smith, "The Seizure and Occupation of Samoa," in H. T. B. Drew, *The War Effort of New Zealand* (1923), p. 23.

[85] According to Mary Boyd "The Record in Western Samoa to 1945" in Augus Ross, *New Zealand's Record in the Pacific Islands in the Twentieth Century* (Wellington, New Zealand: The New Zealand Institute of International Affairs, 1969), p. 123: New Zealand was identified in Samoan (and Tokelauan) minds with tyrannies "such as internment, deportation, censorship, curfews and prohibition of trade."

The Mau was immeasurably strengthened by this "martyrdom" of Tamases and ten other patriots and determined never to submit or to forget New Zealand's "military atrocities" against an "unarmed procession." They all planned to ask the United States of America to take over the government. Because of the moral support of the American Consul in Apia to the Mau the New Zealand Administrator for Western Samoa (and Tokelau) closed the U.S. Consulate at Apia and cut the telephone lines to Pago Pago.

As you know, the State Department has a hang-up with a 1939 note. The U.S. sent notes to Britain prior to and after that year in re United States Sovereignty over Pacific Islands. I can not see why that note is more important than any other note. Can you?

There is a good size Tokelauan population in both American Samoa and the Western United States. The Tokelauans would emigrate from Atafu, Fakaofu, and Nukunono atolls to Olosenga atoll. From Olosenga the Tokelauans would move on to Tutuila (the main Tokelau community lives near the Lyndon B. Johnson Tropical Medical Center). From there they would move on to Hawaii and California. (Almost all of the Samoan and Tokelau population in the States live in California and Hawaii.) There are more Tokelauans living in Hawaii and California than there are in Tokelau. (There are more Tokelauans in Peru than in the Tokelau, because of the Slave Raids in the early 1860's.) The present Tokelauans are "an improbably bizarre genetic mixture" according to P. D. Raspe, because of several American beachcombers settling in the islands and intermarrying with local women.

In 1948 (nine years after that 1939 note) New Zealand declared formal sovereignty over the Tokelau Islands even though they were under U.S. Sovereignty since 1860.[56]

The treaty (of 2 December 1980) was signed by Amusia Patea, Itieli Pereira, and Senio Sakalia for New Zealand. I do not know why the Faipule for Nukunono did not sign the treaty, but it may be that he objected to the ending of limited States Sovereignty, since the Nukunono Islands made the strongest objections to British-New Zealand claims of control over that Island ever since 1889.[57]

The real power in these islands are the chiefs, not the Faipules (who are the "Uncle Toms" for the New Zealand Government).

I know for a fact that the chiefs of the Tokelaus came to Pago Pago for help, i.e., they asked Governor H. Rex Lee of American Samoa to order the New Zealand Administrator out of their islands, since they considered the United States Government their "mother and father." Governor Lee said it was out of his control and told the chiefs to write the U.S. Department of State.[58]

We of the Society for the Protection of American Sovereignty believe that these treaties should be rejected in their present form and call on the Senate to stay with the status quo ante, until new treaties can be drafted that will protect the American interest in the South Pacific and prevent the incursion of Soviet bases in the area.

SAN DIEGO STATE UNIVERSITY,
DEPARTMENT OF TELECOMMUNICATIONS AND FILM,
San Diego, Calif., July 14, 1975.

MR. MARK SEIDENBERG,
Young Americans For Freedom, UCLA,
Los Angeles, Calif.

DEAR MR. SEIDENBERG: In your recent letter you asked me for a note of confirmation regarding the visit of a number of chiefs from the Tokala Islands to my office in Pago Pago.

Some time during the year 1962 or 1963 (I do not have my files so I can not confirm the exact date) a group of chiefs from the Tokala Islands showed up at my office unannounced and asked for an audience. To the best of my recollection there were some eight to twelve chiefs. I immediately granted them an interview and they told me that they had been visiting Tokalan friends in American Samoa for the past week or ten days. Their spokesman simply stated they were sent

[56] See: Tokelau Islands Act of 1948.

[57] In each island, the Faipule (who is also the magistrate) are chosen for a term of three years by the islanders on the approved voting list. Said list is approved by the Administration at Apia. The Administrator also approves who can be considered as Faipules. The reason is New Zealand's Tokelau Islands Act of 1948 requires that the Faipules are to be formally appointed by the Administrator. This takes away some of the traditional powers of the High Talking Chiefs.

[58] H. Rex Lee (Former Governor of American Samoa), "Letter to Mark Seidenberg," dated: 14 July 1975. Attached as an appendix.

there by their people to find out the truth about the rumors of the wonderful things that had taken place in American Samoa for the past year. Their spokesman continued by saying that they liked what they saw and as a result, they would like to cede all of the Tokala Islands to the United States.

I advised the chiefs that I did not have the authority to accept such a cession. They were under the impression that I could, as they had heard that I had complete authority in all matters pertaining to American Samoa. They were very disappointed and said they did not know how to go back and tell their people that they had failed in their mission to immediately cede the islands to American Samoa. They were then advised that any formal move along those lines would have to take place through our State Department and I advised them that they should discuss the matter carefully with New Zealand who had immediate responsibility for their administration.

I am sorry that I do not have exact dates and names and numbers, but you understand that the files, if they still exist are in American Samoa. I trust the above will be adequate for your purposes

Sincerely yours,

H. REX LEE.

Senator HAYAKAWA. Will you tell me more about the Society for the Protection of American Sovereignty?

Mr. SEIDENBERG. That organization was formed last August, Senator, because a small group of Californians—basically the entire membership is from California with one member from the District of Columbia——

Senator HAYAKAWA. Mostly Californians?

Mr. SEIDENBERG. Almost all except one, Senator.

Senator HAYAKAWA. And they were formed——

Mr. SEIDENBERG. They were formed because we were concerned about the general retrenchment of the United States.

We are concerned basically with the Pacific and what happened in 1975 with the State Department with regards to Wrangell Island, Alaska, where the State Department entered into for the first time allowing the Soviets to use Wrangell Island, Alaska, for scientific research in relationship to the musk ox.

There are basically two thrusts of the organization. One, we are concerned about the Soviet use in the South Pacific, that is, the concern I have that if the Cook Island Party would take over again, that the Soviets could take over the U.S. military base that was built in Penrhyn.

One other thing that came to my attention, they were talking like there were just a few of these islands with U.S. military bases. Most of these islands were U.S. military bases well after World War II. Christmas Island, for example, was used for H-bomb tests, along with Malden and Penrhyn.

The Canton, if you will notice in my statement, the Canton Air Force Base included more islands than Enderbury and Hull. It includes Berney and Gardner, and I believe Sydney. So there was a greater number of islands included in that base than just those three.

Basically, our claims go back to between 1819 and 1872, when the United States entered claims; long before the British.

One thing that has me concerned is that the United States is now taking the position that we should have other countries recognize our sovereignty. Our sovereignty, for example, in 1912, which I brought out in my statement, Italy asked the United States to recognize their sovereignty over areas in North Africa. United States refused, and in-

formed the Italian Government that that was not our practice. We did not ask for acquisition nor recognition of our claims to the Philippines or Puerto Rico, and none was given.

I think it is a dangerous American precedent for us to ask our sovereignty to be confirmed by other nations. We probably would still be British if we were waiting for other people to confirm our sovereignty, Senator. I think it is a new position in U.S. foreign policy that sovereignty of the United States has to be confirmed by another country.

Senator HAYAKAWA. Senator Jesse Helms of North Carolina, who is a member of this committee, has some questions for you which he will probably forward to you for written replies.

Mr. SEIDENBERG. I would be happy to.

Senator HAYAKAWA. You have done so much work on this already, I hate to impose on you further.

Our own staff has some 15 questions for you, and I am going to ask them to reduce them to five or six and forward them to you also for written answers.

Mr. SEIDENBERG. I would be happy to respond to all 15 questions, Senator.

Senator HAYAKAWA. Fine. I know you are a very hard-working person, Mark. Anyway, I do not want to impose on you too much, but I will try to reduce the number of questions to lighten the load on you because you have put in an enormous amount of effort already.

Mark, I am very grateful to you for your testimony today, and I am very grateful that you received such a good education at San Francisco State College that when you put up an argument, you can document it darn well.

Mr. SEIDENBERG. I appreciate the experience at San Francisco State. It was well worth my years there. Thank you, Senator.

Senator HAYAKAWA. Thank you, Mr. Seidenberg.

We shall now turn to our final witness of the afternoon, Mr. Rohlfing.

Mr. ROHLFING. Welcome to the committee. You may be seated at the witness table and proceed with your statement.

STATEMENT OF HON. FREDERICK W. ROHLFING, HAWAII STATE REPRESENTATIVE, HONOLULU, HAWAII

Mr. ROHLFING. Thank you, Mr. Chairman. My name is Frederick Rohlfing, I am a Hawaii State representative. I am honored by the invitation of your committee to appear on the four Pacific Island Treaties under consideration.

My particular involvement with the treaties under consideration grew out of my role with the American Samoan Government in 1979 as Director of the Liaison Office established by Governor Coleman in Honolulu. In that capacity, I served as an adviser at two of the Kiribati treaty sessions, first with Governor Coleman at CINCPAC headquarters in January 1979, and then with Lieutenant Governor Tufele in Suva, Fiji in May 1979.

Clearly brought out in the hearings today is the importance to American Samoa and to Hawaii of the disposition of these 25 disputed islands in the South Pacific, and the vital concern they are to all island areas of the United States.

The international acceptance of the 200-mile economic zone concept, in effect, has "balkanized" the Pacific Ocean. If you start drawing lines around the island groups, in terms of the 200-mile economic zone, you will see exactly what I am trying to get across.

In being heavily dependent upon its two fish canneries for nongovernmental funds in the private sector, American Samoa was particularly concerned with any action by the United States that affected access by Pago Pago based vessels in Pacific waters.

I believe that the treaties before the committee are in the best interests of the United States, and that they set the tone for a new era of constructive United States-Pacific Island nation relations. To have attempted to hold onto our very weak claims of sovereignty to those islands would have had the opposite effect.

Rejection of these treaties, in my opinion would do immeasurable damage to our foreign policy and national security interests throughout the Pacific.

In this country and even in my native Hawaii, there is a lack of appreciation for the significance of Pacific Island countries and the strategic aspects connected with the vast expanse of ocean around them. Partly, that is due to the peacefulness of the area, which has kept it from our hot spot worry list. There are no Cubans today as far as I know being ferried by Aeroflot to Canton or Enderbury or Swains Island, thank goodness. But the strategic significance of the new nation of Kiribati, Hawaii's nearest foreign neighbor with its 200-mile economic zone extending over a wide belt of the Pacific all the way from Tarawa on the left side of the map in the west, all the way across to Little Caroline Island in the east is obvious. It is almost 5,000 miles across the Pacific.

So the treaties have meaningful geopolitical consequences for the United States and our Pacific territories. Kiribati has only some 60,000 inhabitants, and Tuvalu 9,000 or so, but in terms of the overall picture, these areas are very significant for both our security and for economic reasons.

So I think the treaty, particularly with Kiribati, speaking economically and otherwise, is of major importance.

One of the things that has also been mentioned earlier in testimony on the other side of the argument, are the deposits of ferromanganese in the adjacent reaches of the Pacific. I, too, do not need to tell this committee the significance of the resources of such a vital nature when we are dependent upon imports from South and Central Africa for many strategic minerals.

But I come to a different conclusion. I believe that the political importance of working with these island nations transcends any short-term gain, that might ensue from an attempt to claim sovereignty when we do not have clearly demonstrable rights of possession, and the ultimate political consequence of that position.

I think it is very important to recognize the role of the highest elected officers of American Samoa in the negotiation process itself in all of these treaties. That may even transcend the importance of the actual terms or words of the treaty, and the agreed minute. As important as those terms are to the economic and security interests of the United States and its territories, the good will built up wih Kiribati leaders and the other island leaders by our own indigenous Pacific

leaders in the negotiation sessions and in trying to work out the economic problems thereafter will endure for broader purposes. And this particularly has been the result of the leadership of Gov. Peter Coleman and his Lieutenant Governor Tufele Lía.

I also particularly wish to commend the U.S. Ambassador to Fiji, William Bodde, for his vision in inviting what you might call the "U.S. territorials" to participate fully in the negotiation process. I think there were times when he wished we were not there. We made his job a little rough with our nitpicking, but when the treaties were concluded they were a better reflection of U.S. foreign policy goals and more in tune with the needs of the people in the area than would have been the case without such direct involvement.

In conclusion, it is my opinion that the ratification of the four treaties before this committee is in the best interest of the United States because such action will, first, reinforce close and friendly relations with these island ministates; two, foster a stable and peaceful environment in the South and Central Pacific; three, assist our own territories in the area in achieving needed economic growth; four, deny strategic areas to adverse foreign influence through the consent of the island nations; and five, facilitate future access to vital raw materials of the ocean bottom in the Pacific.

Thank you, Mr. Chairman, for the opportunity to appear before the committee today to present this statement.

[Mr. Rohlfing's prepared statement follows:]

PREPARED STATEMENT OF HON. FREDERICK W. ROHLFING

Mr. Chairman, I am honored by your invitation to appear before the Committee on Foreign Relations to discuss with you four Pacific treaties under consideration by this committee.

My service from 1975 to 1977 as U.S. Alternate Representative on the South Pacific Commission, added to my upbringing in Hawaii and 16 years of Legislative service in the Hawaii State Legislature, has given me a general background knowledge of the Pacific Islands and its people.

My particular involvement with the treaties under consideration grew out of my role with the American Samoan Government (ASG) from 1978 and 1980. I first served as Acting Attorney General and thereafter was appointed as the first Director of the "American Samoa Office—Hawaii," a liaison office for ASG established in late 1978, in Honolulu by Gov. Peter Tali Coleman. As such Director, I served as an advisor at two of the Kiribati treaty sessions, first to Governor Coleman (at the Camp Smith meetings in January 1979) and then to Lt. Governor Tufele Li'a (in Suva, Fiji, in May 1979). The largest number of islands covered by these treaties are involved in the Kiribati and Tuvalu treaties. (18 islands) I was also involved in several meetings in Honolulu with Kiribati, Hawaii, and American Samoan officials regarding Canton Island in respect to joint fishing or other ventures there.

The Territory of American Samoa had much at stake in the determination of rights to the waters of the 25 disputed islands on the South and South Central Pacific. With the advent of the new internationally accepted 200 mile economic zones the Pacific suddenly was, in a sense, "Balkanized."

The major factor in American Samoa's limited private sector economy is its fish canneries which have been primarily supplied by a fleet of non-U.S. flag vessels. When you are a small non-contiguous part of the United States 9,000 miles southwest of Los Angeles and five hours by jet from the nearest state, (Hawaii) the disposition of 25 islands all around you is a matter of real concern.

As it turned out the State Department's Office of Pacific Affairs recognized American Samoa's deep interest and invited us (and Hawaii) to fully participate in preparations for and the actual negotiation of these treaties.

I believe that the treaties which have been concluded are in the best interests of the United States and that they set the tone for a new era of constructive U.S.-Pacific island nation relations. To have attempted to hold on to our very

weak claims would have had the opposite effect. Rejection of these treaties would do immeasurable damage to our foreign policy and national security interests throughout the Pacific.

In general, in this country (and even in my native Hawaii) there is a lack of appreciation for the significance of these island countries and the strategic aspects connected with the vast expanse of ocean around them. The peacefulness of the area has kept it from our daily "hot spot" worry list. No Cubans are being ferried by Aeroflot to Canton or Enderbury or Swains Island. . . . thank goodness! But consider the significance of the new nation of Kiribati. Hawaii's nearest foreign neighbor when its 200 mile economic zone is taken into account—it extends in a wide belt over many thousands of miles of the Central Pacific from well known Tarawa, where many a U.S. Marine lost his life, on the west to little known Christmas and Caroline Islands to the east. I estimate the distance as more than 5,000 miles. Kiribati has 60,000 inhabitants and Tuvalu a mere 9,000 or so, but as far as geo-politics goes in the Pacific these mini-states must be reckoned with. Can you imagine the consequences of Cubans being ferried to the 747-capable strip built by the U.S. on Canton Island? For security and economic reasons our relations with the Republic of Kiribati are therefore most vital. Economically speaking a framework for cooperative efforts by American Samoa (and Hawaii) with the Republic of Kiribati in fishing and other economic ventures in the future (such as deep sea mining of vast deposits of ferromanganese in adjacent reaches of the Pacific). I don't believe I have to tell this committee what the significance of these resources in the Pacific is—with our increasing dependence on imports of critical non-fuel minerals from politically volatile sources in South and Central Africa. In my view, this goal has been fostered more by the participation of the highest elected officers of American Samoa in the negotiation process itself than by the actual words of the treaty or even the agreed minute which accompanied the Kiribati Treaty. (The latter guarantees non-discriminatory access for U.S. vessels supplying the canneries of American Samoa.) As important as the terms of these documents are to the economic and security interest of the U.S. and its territories—the good will built up with Kiribati leaders by our indigenous Pacific leaders in the negotiation sessions and in trying to work out economic problems thereafter will endure for broader purposes. In this regard particularly I wish to commend U.S. Ambassador to Fiji William Bodde for his vision in inviting "the U.S. territorials" to participate fully in the negotiation process. We didn't always make his job easier, but when the treaties were concluded they were a better reflection of U.S. foreign policy goals and more in tune with needs of the people of the area.

While I will not comment in any detail on the negotiations with the other island nations, the thrust as I understand it, was much the same as with Kiribati and Tuvalu—with American Samoa's representatives being fully involved in the preparation for, as well as actual process of negotiations.

It is my opinion that the ratification of the four treaties before this committee is in the best interests of the United States because such action will:

1. Reinforce close and friendly relations with these island mini-states.
2. Foster a stable and peaceful environment in the South and Central Pacific.
3. Assist our own territories in the area in achieving needed economic growth.
4. Deny strategic areas to adverse foreign influence through the consent of the island nations.
5. Facilifate future access to vital raw materials of the ocean bottom in the Pacific.

Thank you for the opportunity to appear before the committee today to present this statement.

Senator HAYAKAWA. Thank you. You are a State representative in the State of Hawaii?

Mr. ROHLFING. Yes.

Senator HAYAKAWA. Representing what constituency?

Mr. ROHLFING. My constituency is southeast Oahu, the city of Honolulu. We are having a redistricting and I am not too sure how long I am going to be representing that area.

Senator HAYAKAWA. Have you visited these islands we are talking about?

Mr. ROHLFING. I have visited a number of islands in the Pacific. I have been to Canton Island in Kiribati on several occasions. I lived

for a short period in American Samoa, and have, as I say, been to many other islands. But I have not been to, for example, Tarawa. I would hope to go there in the near future.

Senator HAYAKAWA. Excuse me. I am going to ask Mr. Seidenberg, since he is still here, to what degree he has visited these islands.

Mr. SEIDENBERG. In two degrees, Senator. In early 1950's when I was a small child, I stopped off in Canton one night and stayed at the Pan American Hotel. Other than that, in 1963 I cruised the islands with my mother on a cruise.

Senator HAYAKAWA. Thank you. In your testimony, Mr. Rohlfing, you say that the treaties will assist our own territories in the Pacific to achieve economic growth. You referred to Hawaii, to American Samoa and what other territories do we have in the Pacific?

Mr. ROHLFING. That is correct, Mr. Chairman. Particularly, American Samoa, and I think that has been brought out by Governor Coleman's testimony with respect to the transshipment potential of Pago Pago harbor, the interrelationships with the fishing fleets, and access to the resources in the area.

The State of Hawaii showed some interest in Canton Island as a potential fishing base in 1979, but has had to sort of pull its horns in a little bit. There was a concept in the summertime that there would be a mother ship sent up off of Midway, and that possibly this ship in the wintertime could be utilized in the region around Canton Island.

There have been some problems with the operations up north, so that they have not expanded down south. But there is a long-term interest in Hawaii with fishing in the area, and also, the potential of, in due course, of ocean mining and whether we will have some chance to participate in the refining of products coming out of the ocean.

Senator HAYAKAWA. I will come back to the ocean mining in a minute, which I am interested in, but you said that the rejection of these treaties would do harm to our foreign policy and national security interests in the Pacific. Do you see, as Mr. Seidenberg has testified, Soviet presence being a threat in any way to these nations?

Mr. ROHLFING. No, it has not been my feeling that the Soviet Union has any real presence in terms of political influence in these countries. In fact, the reverse has been true, which I think has been brought out by the testimony of Ambassador Bodde earlier this afternoon.

It is true that Soviet vessels do travel throughout the Pacific, just as other major nations have sent their vessels, in international waters. Just a few weeks ago a Soviet task force steamed between the island of Hawaii and Maui to emphasize the fact that the Soviet Union has access to international waters.

But that is a different thing from having significant political influence within the areas we are talking about, and I do not believe they do, and I certainly do not believe it would be in our interest to encourage them to do so. If we maintain good relations with these countries, we have a far better chance of denying Soviet intrusion in the area.

Senator HAYAKAWA. Well, what are our security interests? No one is threatening those islands, though. Not Japan, New Zealand, Australia, Indonesia, or the Philippines.

Mr. ROHLFING. Mr. Chairman, as pointed out by Admiral Jones, we are interested in stable, peaceful, productive climate in the South Pacific. That is enhanced in part by the role of leaders from our Pacific

territories and state who work with the other island nations through their regional organizations, such as the South Pacific Commission, the South Pacific Forum, and other similar organizations.

Through that interchange we will be able to build a climate which will prevent any kind of subversion—the most likely type of security problem that we would face of any great significance.

Russian submarines in port in Siberia can launch missiles that will land on Hawaii. So from the standpoint of global positioning of forces, we are talking about quite a different thing. But if they can infiltrate these islands through the failure of the United States to have a policy that works, then the island people alone may not be able to deny such subversive efforts by the other side.

Senator HAYAKAWA. I am convinced, as apparently you are, Mr. Rohlfing, that there are minerals, strategic materials down in the seabed, and that we would have better access to them by having acknowledged the independence of and formed treaties with these new foreign nations. Without the treaties, do we not have access to the oceanbed?

Mr. ROHLFING. Well, I do not claim to be absolutely 100 percent sure of the statement I am about to make. But a lot of the manganese is in waters between Kiribati and Hawaii, and out of the Hawaii 200-mile economic zone. So it is free and open access. That does not mean that there are not other deposits within the geographical areas that are affected by these treaties, in terms of the 200-mile economic zone, but there is ample that is up for grabs, if you will, depending upon what is finalized in regard to the Law of the Sea Treaty.

Senator HAYAKAWA. You feel that the access to these mineral resources would be improved by having regular treaty relationships with these newly-formed nations?

Mr. ROHLFING. Yes, sir, I do.

Senator HAYAKAWA. If you will forgive me, I will turn to Mark again, who seems to have some objections. Please just stay where you are, Mr. Rohlfing.

Mr. SEIDENBERG. I have a copy, if the Senator wants, of the United Nations report where the actual sitings of bulbous nodules are located.

Senator HAYAKAWA. Actual sitings of what?

Mr. SEIDENBERG. Bulbous nodules accreted with manganese, cobalt, zinc.

Senator HAYAKAWA. What about these nodules?

Mr. SEIDENBERG. The United Nations—this is the manganese dioxide, is around these pebbles in the ocean, Senator. The United Nations, like I said during my testimony, has prepared reports about where it is located, and if the Senator would be interested I can show him a copy of the United Nations report.

Senator HAYAKAWA. What does that have to do with this?

Mr. SEIDENBERG. They are within waters that are within 200 miles of these islands that are claimed by the United States.

Senator HAYAKAWA. They are claimed by the United States at present?

Mr. SEIDENBERG. That is correct, they are within the 200-mile limit.

Senator HAYAKAWA. They are not within the jurisdiction of the United Nations?

Mr. SEIDENBERG. No.

Senator HAYAKAWA. So from your point of view, you do not need a treaty from anyone to go in and get them?

Mr. SEIDENBERG. That is right, they are within 200 miles of the islands.

Also, I have a statement that was in the Congressional Record put in by Congressman Dornan, and another by Congressman Dannemeyer. I would like to put them in the record. They are related to these treaties of California.

Senator HAYAKAWA. I see, thank you very much. I am very enlightened by this clear definition of the difference of opinion here. Thank you very much, Mr. Rohlfing. Thank you, Mr. Seidenberg.

[The statements referred to above follow:]

[From the Congressional Record, Nov. 18, 1980]

TREATY OF FRIENDSHIP WITH THE REPUBLIC OF KIRIBATI

[STATEMENT OF HON. ROBERT K. DORNAN]

Mr. DORNAN. Mr. Speaker, on January 24, 1980, President Carter sent to the Senate a "Treaty of Friendship" with the Republic of Kiribati, formerly the Gilbert Islands. The treaty has not been approved by the Senate Foreign Relations Committee and will receive no action this year. However, in light of the question of the constitutional responsibility of the House of Representatives to pass on the cession of any U.S. territory, I submit for the Record the following article on the treaty by Mr. Mark Seidenberg of Los Angeles, who entertains a longstanding interest in U.S. affairs in the South Pacific.

TREATY OF FRIENDSHIP WITH THE REPUBLIC OF KIRIBATI

On January 24, 1980, President Carter transmitted an inchoate "Treaty of 'Friendship' with the Republic of Kiribati [Executive A, 96th Congress, 2d Session]" to the U.S. Senate, where it was "read for the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations."

The essence of this inchoate treaty is to cede 14 U.S. sovereign Pacific Atolls to the pro-Soviet government of the so-called "Republic of Kiribati (formerly Gilbert Islands), without the approval of the House of Representatives as required by Art. IV, § 3, Cl. 2, of the Constitution of the United States. Each of these atolls has an economic zone with a radius of 200 miles (totaling almost 2 million square miles of ocean) rich in tuna and magnesium nodules.

The so-called "Republic of Kiribati" is known all over the Pacific as the most tyrannical regime in Oceania. Since its independence from Great Britain, the anti-American and pro-Soviet junta now in control of Kiribati has usurped control of Ocean Island and has been subjugating the pro-American Banaban Islanders. Mr. Tabai (President of Kiribati) announced last year that "[i]f the Russians come [to the Gilberts] we would talk to them and not send them away." Fifth columnists in the U.S. Department of State and other departments of the United States Government have been lobbying members of the U.S. Senate in support of this cession treaty.

Both Secretary of State Vance and Governor Coleman of American Samoa have been leaving the erroneous impression with members of the Committee on Foreign Relations of the U.S. Senate that the U.S. Government did not advance its claims of sovereignty to the following 14 atolls until 1939, i.e., they are trying to leave a false impression with these Senators that the U.S. claim is very weak historically in order to get this "Treaty of Friendship" out of that Senate Committee by placing these atolls histories in "memory holes" [G. Orwell, 1984]: Birnie, Canton, Caroline, Christmas, Enderbury, Flint, Gardner, Hull, McKean, Malden, Phoenix, Starbuck, Sydney, and Vostock. The fact is all these islands have been claimed by the United States since the mid-1800's.

Christmas Atoll, the largest of these 14 islands, has a similar historic American connection with the other 13 atolls. [Because of space considerations in this article, I will limit my discussion to Christmas Atoll as an example of the American claims to those 14 islands of American Polynesia.] Christmas Island (largest coral atoll in the world) with an area of 234 square miles (over ten times the size of Manhattan Island in New York City) has been American owned since 1825. The U.S. Government acquired sovereignty over Christmas in the following manner and not in 1939 as the Department of State would want people to believe:

First. Captain John Stetson of New Haven, Connecticut, landed on Christmas Atoll from the American ship *Equator* on February 15, 1825. Finding it not occupied he claimed the island for himself.

Second. By a quit-claim deed of assignment, dated May 11, 1857, John Stetson and his wife sold Christmas Atoll to Alfred G. Benson of Brooklyn, New York. On the same date Alfred G. Benson empowered Captain J. L. Pendleton, Master of the ship *John Marshall*, of New York, to take possession of the island, which was accordingly done on the 20th of June 1858, in the name of, and on behalf of, Alfred B. Benson, and his associates, in full conformity with the Guano Islands Act of August 16, 1856 (48 U.S.C. 1411–1419).

Third. By deed dated May 13, 1857, from Alfred G. Benson, aforesaid, to George W. Benson of Brooklyn, granting all of his rights, title, and interest therein, conveyed to him from John Stetson and wife.

Fourth. By deed dated November 24, 1858, from George W. Benson, aforementioned, to the United States Guano Company, of the City, County, and State of New York, conveying all of his right, title, and interest in said discoveries, ceded to him by deed from Alfred G. Benson. On November 25, 1858 the above two Bensons and seven others organized the United States Guano Company as a New York Corporation, pursuant to and in conformity with the act of the Legislature of the State of New York passed on the fifteenth day of April 1857, entitled: "An Act to atuhorize the formation of corporations for the purpose of mining, importing and exporting guano and other fertilizers."

Fifth. The United States Guano Company gave an approved bond in accordance with the requirements of the Guano Islands Act (48 U.S.C. 1411–1419) and U.S Secretary of State Lewis Case issued a certificate to the United States Guano Company for Christmas Atoll on December 29, 1859

Sixth. On July 20, 1872, Commander Richard W. Meade, U.S.N., of the U.S.S. *Narragansett*, formally annexed Christmas Atoll for the Government of the United States of America.

Seventh. Great Britain tacitly admitted United States sovereignty to Christmas Atoll in correspondence with the United States State Department as late as 1872.

Eighth. Ever since the United States Government formally annexed Christmas Atoll on July 20, 1872, it has been constantly publishing documents which have included Christmas Atoll as an island belonging to the government of the United States.

This give away treaty must be stopped in the United States Senate. Write and telegram your Senators today and ask them to vote "No" on the "Treaty of Friendship with the Republic of Kiribati [Executive A, 96th Congress, 2d Session]."

This treaty will be first heard in the Subcommittee on East Asian and Pacific Affairs of the Committee on Foreign Relations, U.S. Senate and then by the full Committee on Foreign Relations.

[From the Congressional Record, Jan. 30, 1980]

U.S. Interests in the Pacific

[STATEMENT OF HON. WILLIAM E. DANNEMEYER]

Mr. Dannemeyer. Mr. Speaker, I rise to address the House out of a concern for the increasingly diminished U.S. presence abroad. We seem to be living in a period when it is the self-appointed task of the President and the Department of State to dismantle our foreign institutions of trade and defense. The prime example of this, of course, was paying the Panamanians to accept the Panama Canal. This setback in our relations in Central America was exacerbated by the subsequent overthrow of our friend Somoza in Nicaragua. Recent months have seen our interests suffer badly in Iran and Afghanistan.

Now a further development has been brought to my attention by David B. Nolan of Canyon Country, Calif. In the following piece, Mr. Nolan places our activities in the Pacific in perspective. If these actions were an isolated instance of U.S. loss of influence they would not be of overwhelming concern. But this seems to be the order of the day, and I fear for the future of this Nation as it retreats before the growing threat of the Soviet bear throughout the world.

I ask unanimous consent that this be printed in the Record.

AMERICAN INTERESTS IN THE PACIFIC

After the giving away of the Panama Canal in which the U.S. even paid for the privilege, our State Department was hard pressed for an encore. It has now turned its attention to redefining American interests in the Pacific.

In 1980 the State Department will push for Senate ratification of two proposals which will turn over U.S. Sovereignty to eighteen Central Pacific Islands and hundreds of thousands of square miles of rich fishing waters. The direct beneficiaries of this largesse are two left leaning emerging nations, the island Republics of Tuvalu and Kiribati. The indirect beneficiary is the Soviet Union with increasing naval and economic clout in the strategic waters at Micronesia and Polynesia.

Our territorial claims being waived include islands in the Line, Phoenix and Ellice groups that have been American controlled since the 1800's. Some like Christmas Island and Hull Island (named after the War of 1812 Commander of the U.S.S. *Constitution*) have rich histories. Nine of these strategic islands have warranted U.S. military bases on them from World War II through the 1970's.

Each of the islands in these widespread groups command a radius of two hundred miles in territorial limits into rich fishing waters. Unfriendly control of these islands could spell economic disaster for the multimillion dollar tuna fishing and canning industry in nearby American Samoa. The Republics of Kiribati (formerly known as the Gilbert Islands) and Tuvalu have already indicated that each plans to charge a heavy "conservation fee" for the future privilege of U.S. fishing interests using what are in reality American waters.

The Island Republics of Tuvalu and Kiribati, both under British control until the 1970's, have combined populations of less than 69,000. Yet they clearly have more than enough clout to have the State Department buckle under to their demands.

They are active member states in the anti-American third world conference group called the South Pacific Forum. They have voted against U.S. entry into that organization and have made overtures in favor of the Red Chinese as well as Russians.

The Treaty with Kiribati which cedes fourteen of the eighteen islands in question was signed on 20 September 1979. It is ironic that this unmeritorious action occurred on the Island of Tarawa in which over 3500 Americans gave up their lives in protecting the interest of the United States in the Pacific in World War II.

The State Department hopes for Senate ratification of the Treaty of Friendship with Tuvalu in early 1980. The ratification of this treaty will expedite the further pact with Kiribati.

These current giveaway proposals give nothing in return for the U.S. In fact a power vacuum will be created which will engender further Soviet influence. Already, the Soviets were granted a fishing fleet base in the nearby island of Tonga. With our worldwide naval decline, the Pacific may never again be known as an American lake. The current giveaway in the South Pacific is only symptomatic of world-wide global retrenchment by the United States.

Senator HAYAKAWA. This brings our hearing to an end. Senator Percy was unable to be present today, but he has asked that we insert into the committee's hearing record a statement in support of the treaties prepared by Mr. George Chaplin, editor-in-chief of the Honolulu Advertiser, who was unable to be present this afternoon. Unless there is objection, Mr. Chaplin's statement will be incorporated into the record at this point.

[Mr. Chaplin's prepared statement follows:]

PREPARED STATEMENT OF GEORGE CHAPLIN, EDITOR-IN-CHIEF OF THE HONOLULU ADVERTISER, HONOLULU, HAWAII

Mr. Chairman, Members of the Committee: I am pleased to submit a written statement in favor of the treaties between the United States and Kiribati, Tuvalu, the Cook Islands and New Zealand (acting on behalf of Tokelau), which for ease of reference I will call the Pacific Island Treaties. Each of the treaties before the Committee advances the United States' interests in the Pacific. None of the treaties exposes the United States to any danger. None of the treaties will cost the U.S. taxpayer money. These are frank statements which should be supported by good arguments.

In presenting them I would like to comment briefly on the role of the United States in the Pacific, and on the image the United States enjoys among Pacific island peoples. As Editor-in-Chief of the Honolulu Advertiser I have a natural

interest in both matters and, I would like to believe, some useful experience in observing the region.

The United States has been a major power in the Pacific since the Spanish-American War, and the pre-eminent power since the Second World War. Long before 1898, of course, American whalers and merchants voyaged across this ocean in search of trade and profit. Missionaries journeyed to what was then the end of the world in search of converts and in testimony to their faith. I am sure there is no member of this distinguished committee who questions that the United States is, and ought to be, deeply interested in this vast basin. The need is to define what our interests are, and to decide how best we can pursue and protect them.

Our strategic interests are manifest. We wish to keep open the sea lanes between our West Coast and Hawaii and Japan, China, Australia, New Zealand, the Philippines and the rest of Southeast Asia. Free passage for American vessels and for those of our major allies, trading partners and prospective trading partners is vital to our defense and to our economic well-being. Our own—and our allies'—use of the trans-Pacific sea lanes is paralleled by our desire to insure that no hostile power acquires the power to block them.

We have not only a further interest but an obligation to protect our possessions of Guam and American Samoa and—needless to say—the State of Hawaii from encroachment by a hostile power.

In addition, we wish to afford U.S. companies the chance to invest in the maritime resources of the Pacific Ocean, to preserve access, on a non-discriminatory basis, to American tuna fleets, to American mineral and petroleum prospectors and to other entrepreneurs.

We also wish to further the economic development and political stability of the island nations of the Pacific, both because it is very much in our own interest and in full accord with American principles and ideals.

What means should we adopt to protect and promote these interests? Although there is bound to be discussion on this question, it is clear in the closing decades of the twentieth century that we cannot use methods common to the nineteenth. Colonial claims are no longer acceptable—to us or to the rest of the free world. Cooperation among our Pacific neighbors is.

And it is on this that the image of U.S. policy in the Pacific Basin turns. The United States is fortunate to enjoy excellent relations with the newly independent nations of the South Pacific, and generally good relations with most of the nations bordering the Pacific. With respect to the island countries, America continues to enjoy an image derived from the sacrifices our people made during the Second World War. Our determination to defend ourselves from attack by a militaristic government in Japan and to liberate islands occupied by Japan made a lasting and favorable impression on the island peoples. So too did our championship in the postwar years of the principles enshrined in the United Nations Charter and our advocacy of the end of colonialism. Our own free society is a great attraction to these nations, in large measure because our strength has been exercised in ways consonant with the rights and hopes of smaller countries.

It is in this context that approval of the Pacific Island Treaties should be viewed. By renouncing weak and vague claims to 25 islands over which we never established sovereignty and for which we no longer have any use, we recognize the value of these islands to our newly independent or self-governing neighbors. To persist in claims which are dubious on legal grounds and provide us with no practical benefits is a direct affront to the territorial integrity of Kiribati, Tuvalu, the Cook Islands and Tokelau.

The gravity of the conflicting claims is easily illustrated: Three of the islands constitute Tokelau; Tuvalu's capital is located on another; and yet another makes up more than half the total land area of Kiribati. These atolls may appear as mere specks on the enormous wastes of the sea from a general American perspective, but to the countries concerned it is as though Great Britain had never relinquished its claims to the Northwest Territory, or the French insisted they still held title to Louisiana. That the United States may once have had facilities on a few of these islands, or that American whalers or guano prospectors may once have landed on them is simply not relevant today.

And the treaties themselves provide that the U.S. and the island countries will consult on matters of mutual concern, will work to promote peace and security in the South Pacific region, and in the case of Kiribati and Tuvalu will consult regarding any proposed use of island territory by a third country.

Furthermore, they call for consultations regarding any future United States use of facilities we constructed in Kiribati (on Canton, Enderbury and Hull) and regarding any future use we may wish to make of Tuvaluan territory for military purposes. The security and defense of the Cook Islands and of Tokelau are guaranteed by New Zealand, with whom we enjoy the intimate defense ties of the ANZUS Treaty. These requirements to cooperate in defense of the area, and to consult should anyone else wish to use the islands for military purposes are provisions which the United States did not have before, and unlike other security agreements they cost us not one dollar.

The treaties also contain specific provisions which facilitate access to fishing grounds for boats serving the canneries of American Samoa and for U.S.-flag fishing vessels generally. When conflicts over fishing rights are common around the world, and show no signs of diminishing in frequency or in the fervor with which they are argued, the achievement of these cooperative and amicable arrangements is heartening, indeed.

Finally, U.S. willingness to negotiate and sign these treaties has earned us the respect and approbation of other Pacific island countries, from Western Samoa to Papua New Guinea, and has enhanced United States standing in regional fora such as the South Pacific Forum and the South Pacific Conference. The United States has shown that it wishes and knows how to deal equitably and sensibly with its smaller friends in the Pacific. To have done otherwise would have been seen as overbearing; to have insisted on the jots and tittles of legal claims never recognized by the international community would have rightly been termed casuistic. In short, to have done otherwise would smack of tactics more suited to our Soviet adversaries.

There has been much talk in thoughtful circles that the twenty-first century will be the Pacific century. Certainly the trends indicate that our trade and commerce with Pacific lands will continue to grow and at a great pace—and I need hardly add that our security and defense will continue to occupy our attention. We obviously should try to ensure that our participation in the Pacific Community in the next century is as harmonious as it can be. This requires the support and cooperation of our Pacific neighbors, whether a populous Japan or a tiny Tuvalu. The Senate's advice and consent to the ratification of these treaties will hardly guarantee us a trouble-free future in the Pacific. But failure to approve these treaties will create understandable resentment among the Pacific island nations where so little now exists, and will create it needlessly.

These treaties protect our security in the area and further economic access for American firms. They seem to me an eminently sensible step to take, one which will contribute to the kind of peaceful and friendly relations we need and wish to keep building in the Pacific. They are reflective of the wisdom and the fair-mindedness and the inherent decency which makes our nation so great.

Senator HAYAKAWA. Let me again express my gratitude to all the people who have taken part today. If there is anyone else in the audience who has a statement to make, you have another 5 minutes in which to make it.

If not, the meeting is adjourned.

[Additional questions and answers follow:]

MARK J. SEIDENBERG'S RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD

Question 1. On page 22 of your statement, you assert that by virtue of Article IV, Sec. 3, Cl. 2 of the Constitution, the House of Representatives must approve these treaties. In *Edwards* v. *Carter* 580 F2d 1055 (D.C. Cir.), *cert denied* 98 Sup. Ct. 2240 (1978) the United States Court of Appeals of the District of Columbia held that Article 4, Sec. 3, Cl. 2 does not bar the President and the Senate, by a self-executing treaty, from disposing of property of the United States without the concurrence of the House of Representatives. Do you contend that these treaties are not self-executing? Otherwise, how do you reconcile your assertion with the Court's holding?

Answer. The opinion per curiam within *Edwards vs. Carter*, 580 F2d 1055 (D.C. Cir.), *cert. denied* 98 Sup. Ct. 2240 (1978) in my view is obiter dictum, since this court affirmed the District Court for the District of Columbia (Bar-

rington D. Parker, J.) which denied injunctive relief on lack of standing.[1] Even if it was not obiter dictum, the *Edwards* case would not operate in the 9th Cir., since the decisions within that circuit held that the property clause of the Constitution is the exclusive method for disposing of federal property (Cf. *United States vs. California*, 332 U.S. 804, 805 (1947), citing *United States vs. San Francisco*, 310 U. S. 16, 29–30 (1940)).[2] Note: e.g. Canton Atoll's venue is within the 9th Cir. (Cf. *United States vs. Paquet*, 131 F. Supp. 32 (D. C. Hawaii 1955)).[3]

The *Edwards* opinion per curiam asserverated (580 F. 2d 1055, 1063–4) that if property is owned by private individuals and covered within the ceded land the treaty can not be self-executing, because the United States has to acquire said property prior to its cession. Such acquisition necessitates "appropriation of funds," implementing legislation is required, see pp. 1058–59 of 580 F. 2d 1055. Similarly, the treaties with Tuvalu, Kiribati, Cook Islands and New Zealand also require implementing legislation prior to cession of the islands in American Polynesia. Unlike the Panama Canal Treaties, private individuals hold title to lands covered by these inchoate treaties. See, e.g., p. 25 and p. 32 of Mark Jerome Seidenberg's statement at the December 1, 1981, hearing before the Subcommittee on East Asian and Pacific Affairs.

Question 2. On page 23 of your statement you discuss the historical ownership of Nuilakita atoll, which is recognized in the proposed treaty with Tuvalu as under the sovereignty of that country. You contend that a one-third interest in the atoll is presently owned by American citizens. Do you know who these citizens are? Are you aware of any American citizens currently asserting a claim of ownership of a portion of this atoll?

Answer. On 13 March 1926, Mrs. Fa'animonimo Misimoa nee Asiono of Ululoloa, Samoa acquired one third interest in Niulakita Atoll. Mrs. Misimoa was naturalized as a United States Citizen in the United States Consular Court at Apia, Samoa, on 10 July 1883. She still was a United States Citizen in 1932, when she passed away. To the best of my present knowledge the testamentary disposition has not occurred to said one-third interest in the real property on Niulakita Atoll, but the title is still held by the executor-trustee of the decedent for Mrs. Misimoa's heirs (who are United States Nationals). Mrs. Misimoa had occupied Niulakita Atoll for the United States. Her daughter Sophia Hellescoe nee Misimoa, was born on Niulakita Atol. Mrs. Hellescoe was also a United States Citizen. The United States Consulate at Apia, Samoa, registered Sophia's birth.

Question 3. On page 25 you state that the other three atolls recognized as under the sovereignty of Tuvalu are owned in "fee" by the United States. Are you contending that the United States has title in fee simple to these atolls? Do you have any evidence to support this contention?

Answer. Yes, I contend that the three atolls are owned in "fee" by the United States. I base that fact on the status of the atolls prior to the time the United States acquired its sovereignty over them in the 1840's (i.e., in 1819 & 1821 the U.S. sovereignty over them was inchoate). The U.S. fee in these three stated atolls are based in part on Cf. *Federal Power Commission vs. Tuscarora Indian Nation*, 362 U.S. 99 (1960), and *Johnson vs. McIntosh*, 8 Wheat. (21 U.S.) 543 (1823).

Question 4. Citizens of the United States own real property all over the world, and citizens of other countries own property here. Is it your contention that ownership of property by a citizen of a foreign country is sufficient to establish foreign sovereignty over that property?

Answer. No. It is not sufficient to establish sovereignty over real property by mere ownership (if the term ownership is used in a proprietary sense). When

[1] In *Myers vs. United States*, 272 U.S. 52 (1926), the Court upheld the right of the President to remove a postmaster from office without restraint by Congress. Although this was the narrow point decided, the opinions consisted of 243 pages. In the majority opinion, language was used to the effect that the power of removal extended to members of the independent regulatory commissions. But when in a later case, *Humphrey's Executor vs. United States*, 295 U.S. 602 (1935), the Government invoked the language in the *Myers* case and sought to apply it to a member of such a commission (the Federal Trade Commission), the Court held such language as dicta and therefore not controlling in the disposition of the later case.

[2] Hearings Before the Committee on Merchant Marine & Fisheries, House of Representatives, 95th Congress, 2nd Session, Serial No. 95–32, "Power of Congress to Dispose of U.S. Property." It should be also noted in the *California* case that the property clause power of Congress was held to be without limitation in the disposing of Federal property. A fortiori, if the disposing of Federal property can be accomplished through self-executing treaties it places limitation on Congress in the disposing of Federal property.

[3] Like Wake Atoll, Canton Atoll venue is in the United States District Court for Hawaii.

Moors sold his two thirds interest in the real property on Nuilakita and Nassau atolls he only sold the proprietary ownership. Sovereignty at that time was in the United States. The problem is that the four governments to which the 26 atolls are to be ceded believe that they have Sovereignty over United States Sovereign atolls because of sales of land on them (even though these sales only took the form of proprietary interest).

Question 5. It is well established in international law that discovery alone is insufficient to create more than "inchoate" sovereignty which, to be perfected must be followed by effective and continuous occupation. It is also well established that failure to perfect sovereignty over a period of time in the face of competing claims results in a loss of sovereignty by abandonment. Your statement seems to assume that sovereignty continues indefinitely once a claim is asserted. Can you cite any legal authority in support of this view?

Answer. I agree with the first sentence of question number five. It should be noted that "effective and continuous occupation" does not have to be actual occupation.[4] I strongly disagree with the second sentence. It is not established in international law that competing claims over a period of time result in a loss of sovereignty by abandonment.[5] It is a very controversial question as to whether the right of prescription is an accepted principle of the law of nations, in the absence of any conveation establishing a term of prescription. Without a term for prescription there can be no abandonment. See appendix A to this reply. A single act of sovereignty suffices to vest title to terra nuillius in a State. In state practice symbolic annexation has been held to be effective and continuous occupation, as in the *Clipperton Island* case.[6] Examples quoted by Keller, Lissitzyn, and Mann are Easter Island (in 1770), Florida, Java, New England, North Carolina, Nova Scotia, Trinidad and Virginia.[7]

Question 6. Are you aware of any formal assertion of sovereignty by the United States over the Ellice Islands between 1892, when the British protectorate was proclaimed, and 1939?

Answer. The British did not proclaim one protectorate over the Ellice Islands until 1910 or 1911. Yes, I am aware of a few. Mr. Harry Jay Moors recorded his title to Nuilakita Atoll at the United States Consular Court at Apia, Samoa. His employees informed Captain Edward H. M. Davis, R.N. in a flag waving of "Old Glory" on the Nuilakita beach. NOTE: Moors title to Nuilakita Atoll was a public record at the United States Consular Court at Apia, Samoa.[8]

Question 7. Your discussion of Canton Island cites several contacts by American citizens and vessels during the mid-19th century, the last occurring in 1872. The United Kingdom asserted sovereignty over the island in 1936. Are you aware of any assertion of sovereignty by the United States prior to President Roosevelt's proclamation of 1938 authorizing the Secretary of the Interior to exercise control over Canton and Enderbury? Can you document any U.S. occupation of Canton from 1872 to 1939?

Answer. In the British Foreign Office Confidential Print No. 6269 it states on page 7 that Canton or Mary Island and Enderbury are claimed by American Citizens. The way the sheet is set up it gives the impression that American Citizen may have been on both Canton and Enderbury in June and July of 1889. Also in 1937 the Commanding Officer of the United States minesweeper *Avocet* informed the Commanding Officer of the New Zealand sloop of war *Wellington* at Canton Atoll that Canton was territory of the United States. The *Avocet* arrived at Canton Atoll first and raised the "stars and stripes". Then the *Wellington* landed its party and the commander of the *Wellington* declared Canton as British. The planting of the British flag in December, 1936 was performed by a privately owned sloop named *Leith*. (See: *New York Times* of 11 July 1937). However, according to Captain E. H. Bryan, Jr., (I met Capt. Bryan in Honolulu in 1970) the British Landing took place on August 6, 1936, from the

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[4] It was ruled in the *Clipperton Island* case, 26 American Journal of International Law (1932), 390 et seq. that a form of symbolic annexation meets the requirement for "effective and continuous occupations."

[5] "The Chamizal Arbitration Between the United States and Mexico," *The American Journal of International Law*, Vol. 5 (1911), p. 782, 805–807.

[6] According to the *Clipperton Island* case, supra, "a territory by virtue of the fact that it was completely uninhabited, is from the first moment when the occupying States makes it appearance there, at the absolute and undisputed disposition of that State, from that moment the taking of possession must be considered as accomplished, and the occupation is hereby completed."

[7] A. S. Keller, O. J. Lissitzyn and F. J. Mann, *Creation of Rights of Sovereignty through Symbolic Acts* (1938).

[8] It should be noted that the British claim of protectorate was not formally sent to the United States Government in the form of a diplomatic note.

H.M.S. *Leith*. Said party according to Bryan did not plant a British flag, but posted a sign on a coconut palm, claiming the island in the name of King Edward VIII. According to the *N. Y. Times*, supra, the *Leith* returned in 1937 and repeated the ceremony in the "name of George VI". However, according to Bryan it was a party from the *Wellington* in 1937 (not the *Leith*) which posted a sign on a coconut palm, claiming the atoll in the "name of George VI". According to Bryan the *Avocet* was a seaplane tender and not a minesweeper. However, both accounts agree that the *Avocet* arrived two weeks before the *Wellington* and the commander of the *Avocet* was Capt. J. F. Hellweg, USN, see J. F. Hellweg, "Eclipse adventures on a desert isle," *National Geographic Magazine*, 72: 377–394, September, 1937. The events of 1937 came down in the following manner to the best of my present knowledge.

In May, 1937 the Navy Department ordered the U.S.S. *Avocet* to go to Canton Atoll and take a survey of Wing's lagoon to check if the lagoon could handle seaplanes. About one year earlier (according to W. J. Mullahey, the former Director, Hawaii Central & South Pacific, Pan American World Airways, in a letter dated: 18 February 1969) the U.S. Department of Commerce became interested in the sovereignty of the uninhabited Central Pacific islands, of "American Polynesia" (guano islands appertaining to the United States) and charted the Maui Baldwin family yacht, the MV *Kinkajou* to carry a team of Hawaiians with equipment to Canton "for weather reporting purposes" (it should be noted that the official purpose of the *Avocet* was to "observe the total eclipse of the sun, which occurred on July 8" even though Canton Atoll was twelve hundred miles from the point of maximum totality). It should be noted that the activity in the Department of Commerce with Canton Atoll did not start in 1936. In 1928, at the request of Sir Charles Edward Kingsford-Smith, the Department of Commerce authorized the northern rim of Canton Atoll as an "emergency landing place between Hawaii and Fiji" for the airplane *Southern Cross*, (see: C. E. Kingsford-Smith *Story of Southern Cross Trans Pacific Flight in 1928*). It should be noted that Kingsford-Smith picture is on the Australian 20 dollar note. The *Southern Cross* passed-over the atoll, and fortunately did not have to try out said emergency landing place. The *Southern Cross* over flight was the first contact with the Atoll by anyone, since the members of the Whitney South Sea Expedition of the American Museum of Natural History visited Canton Atoll between 10 & 17 March 1924, (see: Robert Cushman Murphy, *Birds collected during the Whitney South Sea Expedition*, IV. American Museum Novit., No. 322:1–5). On the arrival of the *Wellington* at Canton Atoll in June, 1937, its commander ordered Capt. Hellweg to remove *Avocet* from its anchorage, so the *Wellington* could anchor at the same spot. Capt. Hellweg refused and informed the commander of the *Wellington* that Canton Atoll has been United States territory since 1854.

I do not regard the act of the *Leith* in 1936 as an assertion of British sovereignty.

The *Wellington* found another anchorage at the other end of the Atoll and sent a party ashore to raise the Union Jack. At this point Capt. Hellweg had a flag waving ceremony of the "Stars and Stripes" with the National 21 gun Salute. All this happened on 3 June 1937 in sight of each others party. At this point the Wellington's men erected a brick structure with a iron Union Jack, but was soon topped by the American built concrete pyramid with an American Flag made of stainless steel.

Between June 3, 1937 (date of the *Wellington Affair*) and March 3, 1938 (date of the issuance of Executive Order No. 7828) the assertions of sovereignty by the United States number several hundred. The following are a few examples of the assertions:

(1) On August 9, 1937 the State Department delivered a diplomatic note to the British Government informing the British that the United States did not accept the Order in Council of March 1937 as binding on the United States, see: RG 59, 811.0141 PG/9, State Department Note to the British Government on Canton Island, 9 August 1937.

(2) On July 23, 1937, Acting Secretary of the Navy William D. Leahy, at the cabinet meeting, brought up the Navy's planned use of Canton Atoll as a patrol plane base, see: RG 59, 811.0141 PG/11½. Memorandum for the Secretary of State from J. P. Moffat of the European Division, 26 July 1937.

(3) On July 26, 1937, President Roosevelt approved the Navy's plan to occupy Canton Atoll from Honolulu, see: Franklin D. Roosevelt Library, PSF: Hull, Confidential Memorandum from the President to the Secretary of State, 26 July 1937.

Question 8. What is the basis for your assertion on page 29 of your statement that "U.S. Navy Cmdr. Richard W. Meade . . . formally annexed Christmas Atoll for the Government of the United States in 1872?" Can you document any U.S. activity on the island after 1879? Are you aware that the United Kingdom occupied the island from 1888 to 1939 without protest from the United States?

Answer. On January 8, 1981, the U.S. Civil Aeronautics Board issued an order for Dockets 34405, 35520 and 37429. The CAB after receiving the Department of State's interpretation of the status of Christmas Atoll determined in said order "after carefully reviewing all of the pleadings and relevant facts" that "In 1872, the commander of the U.S.S. *Narragansett* formally annexed Christmas Island for the United States". I can also document U.S. activity on the island after 1879. Attached as Appendix B is a Navy Department memorandum on the utility of Christmas Atoll from the strategic standpoint. Said document was issued in 1926 and gives some details of the biological survey of the Line Islands (including Christmas Atoll) taken by Lieutenant Commander King on the U.S.S. *Whippoorwill* in 1924. The statement that the United Kingdom occupied the island (Christmas Atoll) from 1888 to 1939 without protest from the United States is not true. According to the General Board of the U.S. Navy of 22 April 1926 the United States Government "reserved all questions that might grow out of its (British Government) occupation thereby maintaining in effect the claims of the United States Government to that Island." The Board concluded that the British activities at Christmas Atoll "does not appear to establish a valid claim, because it is not believed that it is necessary for a government having sovereignty over a distant island to maintain on the spot evidence that it is claimed by that government, nor that it must be continuously occupied by the citizens of that government." The Board further stated "such claim by the British Government would appear to be in the nature of a squatters' claim which it is not believed is in accord with international usage in regard to sovereignty of territory" (see U.S. Navy General Board No. 414-3, dated 22 April 1926).

Question 9. On page 31 of your statement, you assert that a one-third interest in Nassau Atoll is currently owned by U.S. citizens. Are you aware of any U.S. citizens who are currently asserting ownership to land on Nassau Atoll?

Answer. On 13 March 1926, Mrs. Fa'animonimo Misimoa nee Asiono of Ululoloa, Samoa acquired one third interest in Nassau Atoll. Mrs. Misimoa was naturalized as a United States citizen in the United States Consular Court at Apia, Samoa, on 10 July 1883. She still was a United States citizen in 1932, when she passed away. To the best of my present knowledge the testamontary disposition has not occurred to said one-third interest in the real property on Nassau Atoll, but the title is still held by the executor-trustee of the decedent for Mrs. Misimoa's heirs (who are United States Nationals). Nassau Atoll was acquired from Captain John Ellacott, on the death of his wife, for the very reduced price of four thousand dollars, see, H. J. Moors, *With Stevenson In Samoa*, (Boston: Small, Maynard & Company, 1910), p. 198.

Question 10. The case of *Jones* v. *United States*, 137 U.S. 202 (1890), to which you refer on two occasions, dealt with the *jurisdiction* of the United States over criminal offenses committed on Navassa Island, an island in the Caribbean occupied by U.S. citizens pursuant to the Guano Islands. Are you aware of the distinction in international law between jurisidction and sovereignty?

Answer. Yes, I am aware of the distinction in international law between jurisdiction and sovereignty. I call your attention to 34 Attorney General Opinion 507, entitled: *Sovereignty Over Swain Islands*. U.S. Attorney General John G. Sargent in said opinion stated the "Secretary of the Treasury, under date of February 12, 1869, issued instructions to collectors of the customs directing them to enforce the provisions of the Coastwise Shipping Laws to guano islands appertaining to the United States, and inclosed therewith a list of such islands, among which appears Swain Islands." (Also included on that list were 21 of the atolls covered by three of the four cession treaties (except the Tuvalu Treaty)). "It appears, therefore, that the certificate set forth above was considered by both the Secretary of State and the Secretary of the Treasury as a sufficient proclamation of the extension of sovereignty over the Swain Islands", see: 34 A. G. Op. 507, 512. Attorney General Sargent went on and stated that "the sovereignty of the United States attached to" Swain Islands on 11 February 1863, because of the executive action under the terms of the Guano Islands Act, see: 34 A. G. Op. 507, 515. A fortiori, if the sovereignty of the United States attached to Swain Islands by the executive action under the terms of the Guano Islands Act, then the guano islands appertaining to the United States covered in the inchoate treaties aforementioned are also under the sovereignty of the United States.

Question 11. You refer on numerous occasions to activities undertaken by the United States citizens pursuant to the Guano Islands Act of 1856. Do you contend that the United States obtained sovereignty over islands which "appertained" to the United States under the Act? If so, how do you reconcile this view to the holding in *Grafflin* v. *Navassa Phosphate Co.* that "[T]he provisions of the law entirely negative any idea that such islands were in any sense to become part of the territorial domain of the United States" 35 Fed. Rep. 474 (Cir. Ct. D. Md. 1888).

Answer. I contend that the aforementioned instructions to collectors of customs, under date of 12 February 1869, was a sufficient proclamation of the extension of national external sovereignty by the United States over the aforementioned 21 atolls, and the pretended new title by Britain (now with Tuvalu and Kiribati) and New Zealand were and still are in derogation of the legal rights of the United States. As such it was and still is contrary to international law. See, 34 A. G. Op. 507, 512, 515. In the case of *Grafflin vs. Navassa Phosphate Co. of New York, (Duncan, Petitioner.)*, 35 F. 474, 475, Judge Morris took the view that Navassa could not in "any sense" be "part of the territorial domain of the United States", because "there was no government having territorial jurisdiction" over the island. Judge Morris was saying there was no general applicability of the Constitution with respect to the civil and private rights of the inhabitants on Navassa as there was in the northwest territorial domain of the United States under "the ordinance of 1787," (see, 35 F. 474, 476), i.e., he was drawing a distinction between "incorporated" and "unincorporated" territory of the United States as the Insular Cases did at the turn of the century. The Insular Cases declared Puerto Rico and the Philippines to be "unincorporated" territories, "appurtenant to", and dependencies of, the United States, but not part of the United States. A fortiori, if Puerto Rico was under the national external sovereignty of the United States then the guano islands are also.

Question 12. On page 32 of your statement, you object to a statement by former Deputy Secretary of State Warren Christopher that no other nation supports our claims to the Islands recognized as under the sovereignty of the Cook Islands by the proposed treaty with that nation. Don't you think the universal lack of support for our claims, even among our close allies, reflects the weakness of the claims?

Answer. I was not aware that the United States Government asked other nations to "support" our claims. I believe views stated by the United States in *U.S. For. Rel. 1913*, p. 609, "that when the United States took over the Philippine Islands and Porto Pico, foreign governments were not asked for their acquiescence nor for their recognition, and none was given". I believe the United States claim of sovereignty is paramount to these 26 South Pacific Atolls, and recognition is dispensed with in the course of international practice of new international rights as a condition of their validity, see the Award in the *Island of Palmas Arbitration* (Annual Digest, 1927–28, Case no. 71). I and our organization believes that the views on this point as expressed by former acting Secretary of State Warren Christopher are at variance with the U.S. Constitution, and belong in a United World Federalist policy statement instead of the view point of the State Department. A large part of the State of Florida would not be part of the United States (if said view on support of claims prevailed), because Fidel Castro's so-called "Government of Cuba" has recognized the Miccosukee Indians as a sovereign independent nation with a territorial boundary of a good part of the State of Florida.

Question 13. On page 36 of your statement, you claim that the children of an American trader who visited the atolls of Atafu, Fakaufu and Nukunomo in the 1870's are scattered among these atolls and thus "United States citizens have been living on all of the atolls continuously since the 1870's." Do you regard the present descendants of this trader as U.S. citizens? If so, on what legal basis?

Answer. Yes, I consider some of present descendants of that American trader as United States citizens. He had children with common law wifes on each of the three atolls. They were born prior to the Cable Act. Some of the present descendants have lived on Swains Island for the required period of time to keep there United States Citizenship, others have met the requirement of time in American Samoa, and others fall under the term *United States* as stated by Judge McLaughlin in *United States vs. Paquet*, 131 F.Supp. 32, citing *Alcantra vs. Boyd*, 222 F.2d 445.

Question 14. On page 37 of your statement you refer to a formal assertion of U.S. sovereignty over Olosenga Atoll (Swains Island) by President Coolidge in 1925. As you know, the treaty with New Zealand recognizes U.S. sovereignty

over Swains. You apparently believe that the United States has a valid claim of sovereignty over all the islands covered by the treaties. How do you explain the fact that, prior to 1939, a formal assertion was made only with respect to Swains Island? Why weren't the other islands included?

Answer. First, it is redundant for New Zealand to recognize U.S. sovereignty over Swains in this treaty, because the British Assistant High Commissioner for the Western Pacific formally informed the American Consul at Apia, 10 November 1910, that the British Government recognized Swain's Is'and as United States territory, see, Consul at Apia to Department, 26 November 1910, File No. 811.0141Q/5. At that time international affairs of New Zealand were imperial questions and were handled by the British Government.

Second, it is not true that a formal assertion was made only over Swains Island prior to 1939. The United States made "proclamation of the extension of sovereignty" over the four Tokelau (Union) Island on 12 February 1869, that is prior to 1939, see, 34 A. G. Op. 507, 512.

Third, the reason the others were not placed under the jurisdiction of American Samoa was that the United States Government at the time did not want to place the three northern Tokelaus under the jurisdiction of the Naval Government at Pago Pago.

Question 15. You state on page 38 that the United States sent notes to Britain asserting sovereignty over Pacific Islands prior to 1939. With the exception of Swains Island, what other instances of a formal assertion of sovereignty can you document prior to that date?

Answer. The United States Government started asserting sovereignty over Pacific Islands in 1813. The United States protected it paramount rights against both Germany and Britain in constant stream of diplomatic notes ever since the secret British-German agreement on 1886 which pretended to divide the Pacific Islands in British and German "spheres of influence" and drive the American traders out of the islands (American goods at that time were far cheaper than both Britain and German goods, because of the high transportation costs from Europe to the Pacific Islands at that time period.) As Secretary of State Thomas F. Bayard said in a dispatch of protest:

> "There are islands in the Pacific Ocean known to be wholly in the undisturbed possession of American citizens as peaceable settlers, and there are many others where American citizens have established themselves in common with other foreigners." (see, Moore, I *Digest of International Law*, 423 (1906))

The United States Department of State has informed both the British and later New Zealand that the 1916, 1919, 1925, and 1937 Orders in Council were not binding on the United States, e.g., RG 59, 811.0141 PG/9, dated 9 August 1937. These diplomatic notes were also issued at the time Orders in Council were. All this took place prior to 1939.

The State Department has informed the British and New Zealand governments numerous times after 1939 and before 1939 that these islands were under United States sovereignty, and the U.S. Government did not recognize British or New Zealand sovereignty over said islands, nor their right to administer them (see, Whitemans, *Digest of International Law*).

[From the American Journal of International Law, vol. 5—1911, pp. 782, 805–807, Decisions Involving Questions of International Law]

THE CHAMIZAL ARBITRATION BETWEEN THE UNITED STATES AND MEXICO
MINUTES OF MEETING OF THE JOINT COMMISSION, JUNE 10, 1911

(Page 782)—"The Joint Commission having been in session every day since the close of argument on June 2, 1911, discussing evidence and argument presented by the agents and counsel of the two governments, proceeded to ballot for the purpose of arriving at a decision upon the following point(s), to-wit:"

"II—Has the United States of America acquired title to the Chamizal tract by prescription?"

(Page 805)—"Prescription"

"In the countercase of the United States, the contention is advanced that the United States has acquired a good title by prescription to the tract in dispute, in addition to its title under treaty provisions.

"In the argument it is contended that the Republic of Mexico is estopped (Page 806) from asserting the national title over territory known as 'El Chamizal' by reason of the undisturbed, uninterrupted and unchal'enged possession of said territory by the United States of America since the Treaty of Guadalupe Hidalgo.

"Without thinking it necessary to discuss the very controversial question as to whether the right of prescription invoked by the United States is an accepted principle of the law of nations, in the absence of any convention establishing a term of prescription, the Commissioners are unanimous in coming to the conclusion that the possession of the United States in the present case was not of such a character as to found a prescriptive title." . . .

. . . (A) "characteristic of possession serving as a foundation for (Page 807) prescription is that it should be peaceable."

"It is quite clear". . . that "Mexico may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico can not be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence.

"In private law, the interruption of prescription is effected by a suit, but in dealings between nations this is of course impossible, unless and until an international tribunal is established for such purpose. In the present case, the Mexican claim was asserted before the International Boundary Commission within a reasonable time after it commenced to exercise its functions, and prior to that date the Mexican Government has done all that could be reasonably required of it by way of protest against the alleged encroachment.

"Under these circumstances the Commissioners have no difficulty in coming to the conclusion that the plea of prescription should be dismissed."

NAVY DEPARTMENT,
OFFICE OF CHIEF OF NAVAL OPERATIONS,
Washington, D.C., January 23, 1926.

MEMORANDUM

Subject: The utility of Christmas Island from the strategic standpoint

1. It is presumed that the General Board has seen all the papers covering the legal aspects of the claim of the United States to sovereignty over Christmas Island. Some of these papers, notably the report of Lieutenant Commander King on the biological survey of the Line Islands made by the U.S.S. *Whippoorwill* July 24, 1924 to August 27, 1924 contains descriptive matter covering Christmas Island. The following table of distances from Christmas Island is given as informative:

	Christmas Island	Fanning Island	Jarvis Island	Washington Island	Palmyra Island	Honolulu	Pago Pago
Christmas Island		165	205	240	365	1,161	1,257
Fanning Island	165		262	75	200	1,056	
Jarvis Island	205	262		308	396		
Washington Island	240	75	308		125		
Palmyra Island	365	200	396	125		958	1,316
Honolulu	1,161	1,056			958		
Pago Pago	1,257				1,316		

2. From a study of the geographical location of Christmas Island, with relation to the locations listed in the above table and all other islands, whether in the possession of the United States or of possible allies, or enemies, the Director of War Plans is of the opinion that in the present state of development of the instruments of naval warfare, there are three uses to which Christmas Island could be put in war.

(a) Seaplane base or station for seaplanes in flight between Hawaii and Samoa, and for seaplane operations in the area of Christmas Island.

(b) Submarine base for the support of submarines en route from Hawaii to southwestern points, or for the support of submarines operating in the Christmas Island area.

(c) Radio station.

SEAPLANE BASE

3. An examination of the chart and other data on Christmas Island shows that it is much better adapted for the operation of seaplanes than is Palmyra Island, both as regards landing places for seaplanes and protected anchorage for same, and as regards the erection of facilities for support of seaplanes ashore.

4. As regards location, Christmas Island is slightly better located than Palmyra Island for use as a stopping place in flight between Honolulu and Pago Pago as shown by the following table of distances:

Honolulu to Palmyra	—958
Palmyra to Pago Pago	—1,316
Honolulu to Christmas	1,161
Christmas to Pago Pago	1,257

SUBMARINE BASE

5. Study of H.O. Chart 1839—West Side and Entrance to the Lagoon of Christmas Island—shows that submarines can enter the lagoon for a very short distance, and occupy an area roughly 300 yards square. This is too restricted for extensive operations, but might serve for operations of a minor character. By dredging a distance of approximately 600 yards it appears probable from the chart that entry into the interior of the lagoon could be effected, giving a much larger anchorage area. It appears that approximately 6 feet of ground would have to be dredged away to permit this entrance, and that a total of about 60,000 yards cubic yards would have to be dredged away.

6. From the soundings given on the chart, it appears that dredging to permit light cruisers to enter the lagoon, would not be practicable.

7. Palmyra Island could not be used for even the most restricted operations of submarines.

RADIO STATIONS

8. The principal advantage of Christmas Island over Palmyra Island for a radio station, is the fact that it would be far easier to conceal a radio station on Christmas Island, so that it could not possibly be seen from seaward and would require a considerable search of the Island to locate it. The only other advantages possessed by Christmas Island over Palmyra Island for a radio station lies in the fact that it would be easier to erect a radio station there, and easier to supply it from time to time. Also, the personnel operating the station would be better off on the larger island. At present it is not understood that the erection of a radio station on any of the Line Islands is contemplated, but in war it might become very necessary for purposes of direction finding in detection of enemy movements.

9. The Director of War Plans Division is of the opinion that the possession of Christmas Island by the United States is desirable for the above strategic reasons, and that the claim of the United States for this Island should be pressed.

W. H. STANDLEY,
Captain, U.S. Navy, Director, War Plans Division.

STATE DEPARTMENT'S COMMENTS ON MR. SEIDENBERG'S RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD

In response to question 1, Mr. Seidenberg asserts that the decision of the Court of Appeals for the District of Columbia in *Edwards* v. *Carter*, 580 F.2d 1055 (D.C. Circuit), *cert denied*, 98 Supreme Court 2240 (1978) is *obiter dictum*. Black's Law Dictionary, 4th Edition, defines that term as:

> A remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument.

The power of the President and the Senate to transfer property of the United States by treaty was directly at issue in the *Edwards* case and was extensively briefed and argued before the court. The precise holding of the court in *Edwards*, was that the property clause of the United States constitution does not prohibit the transfer of U.S. property to foreign nations through self-executing treaties. The fact that the Court of Appeals decided the case on grounds other than those relied on by the District Court in no sense transforms its holding into *dicta*. Mr. Seidenberg has confused two unrelated concepts.

Mr. Seidenberg goes on to argue that the *Edwards* opinion is not binding in the 9th Circuit, and that the law in that circuit differs from the holding of *Edwards*. It is true that decisions of one U.S. Court of Appeals do not bind another. However, there is no decision in the 9th Circuit or any other Circuit which is contrary to the holding of the *Edwards* case. The court in *Edwards* noted that no prior

case addressed the precise issue which was before it, whether the property clause prohibits the transfer of U.S. property through self-executing treaties. 580 Fed 2nd at 1061. The two cases cited by Mr. Seidenberg have nothing to do with this issue; they hold rather that Congressional power with regard to Federal property precludes the exercise of such power by a State.

Mr. Seidenberg goes on to argue, on the basis of *dictum* in the *Edwards* opinion, that these treaties require implementing legislation because private individuals hold title to land on islands to which the claims of the United States would be relinquished. In response to the Committee's questions 2 and 9, Mr. Seidenberg was unable to adduce any current evidence that such titles exist; his point is therefore academic at best.

Mr. Seidenberg contends in response to question 3 that the United States has acquired "title in fee" to three atolls recognized by the proposed treaty as under the sovereignty of Tuvalu. In support of his position, he cites two decisions of the U.S. Supreme Court which bear no apparent relation to the question at issue. *Federal Power Commission* v. *Tusarora Indian Nation*, 362 U.S. 99 (1960) concerned the question of whether Indian tribal lands owned in fee could be taken by the Federal Government through an exercise of imminent domain. In *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat) 543 (1823), the court decided that Indian tribes lacked the authority to convey title to tribal lands to private purchasers. Neither case supports Mr. Seidenberg's assertion.

In response to question 5, Mr. Seidenberg contests the statement that "It is . . . well established that failure to perfect sovereignty over a period of time in the face of competing claims results in a loss of sovereignty by abandonment." He appears to take the position that once sovereignty has been asserted, it can never be lost, despite the absence over a period of years of any exercise of the sovereignty initially claimed.

A recent and authoritative commentator on the subject has written "If a subject of international law abandons its exercise of territorial jurisdiction over a territory, any other subject of international law is free to establish there its own jurisdiction. This was the *ratio decidendi* of the *Clipperton Island* case (1931) between France and Mexico."[1] Schwarzenberger, "Title to Territory: Response to a Challenge," 51 AJIL 308 at 314 (1957).

In the *Clipperton Island* case, Mexico, as successor to Spain, claimed sovereignty over the island on the basis of alleged discovery by the Spanish Navy many years prior to the first formal assertion of sovereignty by France in November 1858. Accepting, *arguendo* the validity Mexico's claim of discovery, the arbiter found that Mexico had failed to effectively exercise its right and thus had forfeited its claim of sovereignty. Mr. Seidenberg cites a related finding of the arbiter in the *Clipperton Island* case, that the continuous occupation required to affect sovereignty could be constructive rather than actual in the case of uninhabited islands. He does not refer to the principal holding of the case, i.e., that Mexico had lost its claim of sovereignty based on discovery through non-exercise or abandonment.

The *Chamizal* arbitration, which Mr. Seidenberg cites in support of his view that there can be no abandonment following an initial claim of sovereignty, does not support this proposition. The Joint Commission found that, in view of the repeated challenge to U.S. occupation by the Republic of Mexico, the United States had not acquired sovereignty by prescription because Mexico had obviously not anbandoned its own claim. It is true that the Joint Commission described as "controversial" the issue of whether the right of prescription was an accepted principal of the law of nations. This question may have been controversial in 1911 when the opinion was rendered. In the intervening years, however, it has become well established. *See* generally Whiteman, *Digest of International Law*, vol. 2, pages 1062–1084.

In response to question 8 regarding the basis for Mr. Seidenberg's assertion that Commander Meade formally annexed Christmas atoll for the United States in 1872, Mr. Seidenberger cites a recent order of the Civil Aeronautics Board. That order was issued in response to a complaint filed by Mr. Seidenberg in the name of the Tuvalu Islands Developing Company, Inc. against an application by Air Tungaru to provide services between Tarawa, Kiribati, and Honolulu, Hawaii with an intermediate stop on Christmas Island. (Docket No. 37429) Mr. Seidenberg contended that service between Christmas island and Honolulu constituted cabotage (i.e., service between points, both of which are in the United States) for which foreign carriers are ineligible. The Board rejected Mr. Seidenberg's contention. The sentence quoted from the Board's order does not constitute an adjudicated finding of fact; no evidence was presented on this point. The Board merely repeated an assertion contained in Mr. Seidenberg's complaint.

[1] 2 Int. Arb. Awards 1105 at 1110; 26 A.J.I.L. 390 (1932).

Mr. Seidenberg, in response to questions 10 and 14, asserts that an instruction issued by the Secretary of the Treasury to the collectors of Customs on February 12, 1869 to apply to Coastwise Shipping Laws to shipments of guano from designated islands, constituted a formal assertion of U.S. sovereignty over these islands. This is clearly incorrect. The intention of the Guano Islands Act was to authorize only a temporary extension of U.S. jurisdiction over islands on which a U.S. citizen intended to mine guano. One aspect of this temporary extension of jurisdiction was the application of U.S. statutes, such as the Coastwise Shipping Laws, which were necessary to facilitate the mining of the guano and its shipment to the United States. The Act did not contemplate or authorize any permanent extension of U.S. jurisdiction or sovereignty. Section 4 provides:

> Nothing in this chapter contained shall be continued as obliging the United States to retain possession of the islands . . . after the guano shall have been removed from the same. 48 U.S.C. § 1419.

An examination of the debates in the Senate at the time the bill, which later became the Guano Islands Act, was under consideration discloses that those in charge of it did not consider that sovereignty would be acquired over the guano islands by the Act. Senater Seward who proposed the bill stated in part:

> The bill itself then provides that whenever the guano shall be exhausted, or cease to be found on the islands, they should revert and relapse out of the jurisdiction of the United States.

Senator Mason stated:

> These guano islands, it is well understood, have no value in the world except for the deposit on them—what has been put there by the birds. The bill provides that, when the deposit is removed, if it ever shall be, the title of the United States shall cease, and the islands be abandoned." (Congressional Globe, 34th Congress, 2d Session, 1865, page 1740).

Of course, where the United States, under the conditions set forth in the Act, has recognized that a guano island appertains to the United States, it would continue to maintain its jurisdiction so long as the island were occupied by American citizens for the purpose of extracting guano and would naturally refuse to recognize any attempt of any other country to acquire jurisdiction during such period. (See 34 Op. Atty. Gen'l. 507.)

The question to which the Attorney General was responding in that opinion (to which Mr. Seidenberg refers) was whether the statutory requirements of the Guano Islands Act had been fulfilled with respect to Swain Island. In answering this question in the affirmative, the Attorney General referred at several points the acquisition of "sovereignty" under the Guano Islands Act. This is an incorrect use of the term; "jurisdiction" should have been used to describe U.S. interests in Swain Island and other guano islands during the period in which mining operations by U.S. nationals were being conducted. It is clear from the legislative history of the Act (*supra*), judicial construction of its provisions,[2] prior statements by the Attorney General[3] and repeated opinions by the Department of State's Legal Adviser[4] that the Act did not authorize the acquisition of sovereignty.

In response to question 11, Mr. Seidenberg attempts to distinguish the holding of the Court in *Grafflin* v. *Navassa Phosphate Company*, *supra*, that the Guano Islands in no sense became part of the territorial domain of the United States by arguing that the Court was merely referring to the distinction between "incorporated" and "unincorporated" territory of the United States. Nothing in the Court's opinion supports this argument. The Court expressly held that the Act authorized only a temporary extension of jurisdiction. The opinion states that "it [the Act] treats these islands, as in fact they are, as unsuited for permanent settlement by civilized communities, and as only temporarily occupied for the purpose of obtaining the guano". 35 Fed. 474, 475. This concept of temporary occupation for a single purpose is wholly incompatible with an assertion that the Court regarded these islands as unincorporated territory of the United States.

[Whereupon, at 3:55 p.m., the committee adjourned, subject to call of the Chair.]

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[2] *Grafflin* v. *Navassa Phosphate Company*, 35 Fed. 474 (1890); *affd.* 137 U.S. 202 (1891).

[3] 14 Ops Atty. Gen. 608 (1873); Letter of July 1, 1811 to the Secretary of Commerce, quoted in "Opinions of the Legal Adviser" (1934) Part 2, page 1910.

[4] *See, e.g.*, opinions of the Legal Adviser (1934) Part 2, "The Department has consistently taken the position with regard to these Guano Islands that . . . the Government of the United States claims no sovereignty or territorial rights over such islands, but merely protects citizens of the United States who discover guano thereon, in the prosecution of their enterprise, which extends only to the appropriation and disposal of guano," page 1910.

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